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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
_____ TERM, 19 _____

RICHARD L. DUGGER, etc., et al.,

Appellants/Petitioners

-vs-

ROBERT LAWSON, etc., et al.,

Appellee/Respondent,

_____/

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the court of appeals erred in holding that the constitutionality of prison regulations and policies governing the receipt of publications by state prisoners should be evaluated under the strict scrutiney standard of Procunier v. Martinez, 416 U.S. 396 (1974).

Whether the court of appeals erred in holding that this Court's opinion in Procunier v. Martinez, supra, requires the showing of actual harm from the admission of a publication into a state prison before the publication can be banned.

PARTIES TO THE PROCEEDINGS

The petitioners, who were the defendants below, are Richard Dugger, Louie L. Wainwright, William E. Counselman, C.W. Sprouse, Stephen Spencer, and Paul Coburn.

The respondent-class representative is Robert Lawson.

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The Attorney General of the State of Florida on behalf of Richard Dugger, Secretary of the Florida Department of Corrections, and other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on petition for rehearing is reported at 840 F.2d 779 (11th Cir. 1988). See also App. A26 - A30. The initial opinion of the court of appeals was not reported. It is reproduced at pp. A1 - A25 of the Appendix.

The decision of the district court is reported at 641 F.Supp. 312 (S.D. Fla. 1986). See Appendix, pp. A31 - A126.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1987. The court of appeals denied with an opinion the petitioners' petition for rehearing and for rehearing en banc on March 3, 1988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, REGULATIONS AND PROGRAM STATEMENT INVOLVED

The First Amendment of the U. S. Constitution provides in part:

> Congress shall make no law respecting an establishment of relying or prohibiting the free exercise thereof . . ., or abridging the freedom of speech, or of the press . . .

42 U.S.C.A. § 1983, which states -

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilegtes, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The regulation at issue in this case is Rule 33-3.012, Florida Administrative Code, which states in part:

33-3.012 Admissible Reading Material

> (1)(b) Religious materials shall be subject to the provisions of this rule, except that:
>
> 1. religious publications shall not require inclusion in the Approved Periodical List,
>
> 2. the institutional chaplain, rather than the Superintendent or his designee, shall be the reviewing authority, and
>
> 3. any decision of a chaplain disapproving a religious publication may be appealed to the

Chaplaincy Services Coordinator within 14 days of notice of the disapproval.

* * *

(6) Criteria for Disapproval of Publications. Any publication shall be disapproved and may not be received by inmates if it:

(a) is obscene or contains a graphic presentation of sexual behavior that is in violation of law,

(b) concerns plans for violation of law or Department or institution rules,

(c) is dangerously inflammatory in that it advocates or encourages riot, insurrection, escape, disruption of the institution, violence or violation of law or Department or institution rule, the violation of which would present a serious threat to the security, order or rehabilitative objectives of the institution,

(d) contains information which inmates might use to manufacture or devise weapons, drugs, intoxicants, or escape paraphernalia, or to effect or facilitate escape or disruption of the institution, or

(e) otherwise presents a clear and substantial threat to the

security, order, or rehabilitative objectives of the Correctional System, or to the safety of any person.

STATEMENT OF THE CASE

This case is a statewide class action filed by a prison inmate who professes to be a member of a religious sect known as the Temple of Love. The respondent brought the case on his behalf and that of other members to the Temple of Love in the Florida prison system. The Temple of Love, whose followers are also known as Hebrew Israelites, was founded about 1981 by a man known as Yahweh ben Yahweh. Based in Miami, Florida, the Temple of Love teaches that all blacks are members of the lost tribes of Israel and that God is black and Jesus, Moses, and Abraham were black. Yahweh ben Yahweh teaches his followers "that white society and white-dominated Jewish and Christian mainline churches have

deliberately deceived the American blacks . . . by concealing from them their true heritage as Black Hebrew Israelites." Lawson v. Wainwright, 641 F.Supp. 312, 315 (S.D. Fla. 1986); (A38 - A39).

The suit challenges rules and practices of the Florida Department of Corrections (The department) in excluding Temple of Love publications and allegedly inhibiting the rights of class members in the free exercise of religion. The petitioner/defendants are officials of the department.

The district court found that the petitioners had unconstitutionally refused admission into prison of Temple of Love publications, and the court enjoined them from continuing to do so. The petitioners appealed and the 11th Circuit Court of Appeals affirmed.

Under department rules a prison inmate may receive any book, newspaper or other publication "subject to review and approval by the Superintendent or his designee." Rule 33-3.012(5), F.A.C. However, if the publication is religious in nature, the reviewing authority is the institutional chaplain. Rule 33-3.012(1)(b)2., F.A.C. Decisions to exclude a publication must be based on the criteria set out in the rule. Rule 33-3.012(5), F.A.C.

The basic criteria for exclusion are set out in Rule 33-3.012(5), F.A.C.[1], which provides that publications may be disapproved if they:

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[1] Originally numbered Rule 33-3.12(16), F.A.C.

a. are obscene or contain a graphic representation of sexual behavior that is in violation of law;

b. concern plans for the violation of law or departmental rules;

c. are dangerously inflammatory in that they advocate or encourage riot, insurrection, escape, disruption of the institution, violence or violation of law or departmental rules, the violation of which would present a serious threat to the security, order, or rehabilitative objectives of the institution;

d. contain information which inmates might use to make weapons, drugs or other intoxicants;

e. otherwise present a clear and substantial threat to the security, order, or rehabilitative objectives of the department or to the safety of any person.

Emphasis added.

These criteria apply to the admission of religious literature.

While not set out in the rules, it had been the department's practice to reject an entire publication if it violated one of

the criteria set out above. However, during the course of this litigation, the department offered to amend that practice to remove only those parts of the publications at issue that were determined to be racially inflammatory. (A100)

A five-day trial in the case began on May 19, 1986. Both the respondent/ plaintiffs and the petitioner/defendants presented testimony from a number of expert witnesses who discussed the dangers of racial tensions in prison and the potential of racist literature for provoking prison violence. After the trial, on June 9, 1986, the parties submitted post-trial memoranda outlining their different views concerning the applicable legal standard of review.

The district court issued its Memorandum Opinion Including Findings of Fact and Conclusions of Law on July 18,

1986. Lawson v. Wainwright, 641 F.Supp. 312 (S.D. Fla. 1986); (A31 - A126). The district court held that the department's practices had denied the respondents their First Amendment rights to the free exercise of religion. The trial court issued a detailed injunction that, among other things, required the petitioners to admit eight Temple of Love publications determined by prison officials to be a threat to internal security and order. Lawson v. Wainwright, 641 F.Supp. at 330-331; (A107 - A109).[2]

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[2] The trial court also enjoined the petitioners to:

a. recognize the Temple of Love and the Hebrew Israelites as a bona fide religion and afford the Hebrew Israelites the same rights and privileges concerning religious affairs as other inmates.

b. permit the study of the Hebrew Israelite faith and use of the various

(Cont. on next page)

Regarding these publications, the trial court said "that persons of other races and

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prison chapels by Hebrew Israelites.

c. permit each Hebrew Israelite to wear a religious medallion such as the Star of David provided the medallion conforms with security regulations and could not be used as a weapon.

d. allow each Hebrew Israelite a pork free diet upon request.

e. permit the wearing of religious headgear during formal worship services.

f. require the various prison chaplains to "undertake reasonable efforts" to contact Temple of Love elders and encourage them to visit prisons to conduct services. Lawson v. Wainwright, 641 F.Supp. at 331; A107 - A109.

The petitioners do not challenge these injunctions here. As we pointed out to the courts below, we had already agreed to do these things. See the petitioners' post-trial memorandum of law and appellate brief. In effect, the trial court enjoined the respondents to do things they were already doing. A general policy meeting was held for prison chaplains in August 1985. As a result of that meeting, the trial court conceded, "there has been a bona fide effort to accommodate, through uniform policies, the religious practices of Hebrew Israelite inmates." Lawson, 641 F.Supp. at 321; A67, emphasis the court's. However, the court said that these policies had been inadequately communicated to the various prison chaplains. The result, the court said, was spotty compliance. Id.

creeds may find some or all of these publications distasteful." Lawson v. Wainwright, 641 F.Supp. at 317, n.5; (A112).

However, the court concluded that the petitioners had failed to prove "the occurrence of any violent incident, in any state penal system, which was traceable to the introduction of religious literature of any kind." Id., 641 F.Supp. at 322; (A69). The court also found that the petitioners had failed to prove that the admission of Hebrew Israelite literature resulted in a single incident of violence in the Florida prison system. Id., 641 F.Supp. at 320; (A60).

The trial court applied the test of Procunier v. Martinez, 416 U.S. 396 (1974), in deciding whether the petitioners could constitutionally bar admission to the literature in question.

The trial court held that the petitioners satisfied Martinez's first prong, and that "the defendant's practice of routinely banning the religious literature at issue in this case bears a rational relation to the substantial governmental interest of avoiding strife among inmates." Id., 641 F.Supp. at 323; (A76).

However, the trial court held that the petitioners failed Martinez's second prong and that our practice of banning the publications outright was "a greater than necessary restriction on the plaintiffs' right to freely exercise their religion." Ibid; (A76 - A77). The trial court further held that the practice of banning Hebrew Israelite literature was based solely on officials' subjective judgment. Id., 641 F.Supp. at 324; (A80).

In summation, the trial court held the exclusion of the literature invalid because the petitioners failed "to present any evidence of violence, disruption, or actual threats to the security and order of any institution", and because officials acted only upon a "speculative assessment of potential dangers." Id., 641 F.Supp. at 327; (A93 - A94).

In addition, the trial court declined to consider the respondents' claim that the department's procedures for giving notice of a rejection of a publication and right of review violated the rights of the Temple of Love to procedural due process. Lawson v. Wainwright, 641 F.Supp. at 330; (A104).

The petitioners appealed, and the respondents cross-appealed the court's decision as to notice and review.

After the filing of the briefs in the case, this court issued its opinions in

Turner v. Safely, ____ U.S. ____, 107 S.Ct. 2254 (1987), and O'Lone v. Estate of Shabazz, ____ U.S. ____, 107 S.Ct. 2400 (1987). We cited Turner in a notice of supplemental authority, and we argued its applicability at oral argument.

In an unpublished opinion, a panel of the circuit court of appeals upheld the decision. (A1 - A125) The circuit court focused on the trial court's finding that the petitioners produced "[n]o evidence" of any violence or disciplinary problems from admitting the literature. (A13, A19)

In deciding the case, the panel applied the rule of Procunier v. Martinez, supra, and held that our practice of banning racist and inflammatory literature, when based on a "bare assertion", was overbroad. (A22)

The circuit court also reversed the trial court's decision as to notice and

review. Citing Martinez, the circuit court held that the department's review process did not protect outside publishers and remanded with instructions that the trial court draft new procedures in accordance with Martinez. (A22 - A24)

Following the issuance of the panel's opinion, the petitioners petitioned for rehearing and for rehearing en banc. Our grounds were the panel's failure to discuss the applicability of Turner and O'Lone to this case.

On March 3, 1988, the panel denied rehearing in a published opinion, reaffirming its application of Martinez as controlling authority and distinguishing Turner and O'Lone on the ground that they dealt exclusively with inmates' rights. The present case, like Martinez, concerned the rights of the Temple of Love too, the panel said. Lawson v. Dugger, 840 F.2d at 780; (A27 - A28).

REASONS FOR GRANTING THE WRIT

I.

The circuit court of appeals erred grievously by applying the strict scrutiny test of Procunier v, Martinez, 416 U.S. at 405 (1974), to invalidate a Florida prison practice of excluding racially inflammatory publications that posed a reasonable threat to security.

The lower courts mechanically applied the rule in Martinez without fully understanding its reasoning. In fact, Martinez is a narrowly reaching decision, applying only to a limited class of people, those outside prison who engage in personal correspondence with inmates and whose interest in that correspondence is deeply personal. The lower courts should have applied to the present case the deference-based reasonableness standard of Turner v.

Safley, ____ U.S. ____, 107 S.Ct. 2254 (1987), and O'Lone v. Estate of Shabazz, ____ U.S. ____, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), where the more general rights of publishers are affected by prison officials' decisions.

Recently, this Court re-emphasized that the constitutional rights of prisoners could be limited by prison regulations reasonably related to legitimate governmental interests in the maintenance of security, order, discipline and rehabilitation. See Turner v. Safley, ____ U.S. ____, 107 S.Ct. 2254 (1987); O'Lone v. Estate of Shabazz, ____ U.S. ____, 107 S.Ct. 2400 (1987). These decisions capped a line of cases that stood for this principle. Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119

(1977); Pell v. Procunier, 417 U.S. 817 (1974). The holdings and principles enunciated in these latter cases differ widely from those in Martinez. However, the lower courts have tended to apply the Martinez test in cases involving inmates' constitutional rights when this Court viewed it as inappropriate. Thus, this Court felt compelled to clear the air and make it plain that when inmates' rights were at stake, courts should apply the principles of deference to the reasonable judgment of prison officials on matters affecting legitimate penological interests, and, when as here a state prison is involved, federalism should control separation of powers to invoke judicial restraint. Turner, 107 S.Ct. at 2260 - 2261.

Incarceration necessarily brings about the "'withdrawal or limitation of many

privileges and rights, a retraction justified by the considerations underlying our penal system.'" Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 125. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. at 822. Thus, in Pell this Court said challenges by prisoners to prison regulations must be analyzed "in terms of the legitimate policies and goals of the corrections system." Ibid. In Pell, 417 U.S. at 822-823, the courts identified four such concerns: deterrence, the isolation of the offender for the protection of society, rehabilitation, and the maintenance of internal security and order. See also Bell v. Wolfish, 441 U.S. at 546 (an essential

objective in running a prison is "maintaining institutional security and preserving internal order and discipline"). Thus, this Court has required the lower courts to exercise deference in such cases because "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government." Turner, 107 S.Ct. at 2259. See also Bell v. Wolfish, 441 U.S. at 548 ("the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge").[3]/

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[3]/ And see Procunier v. Martinez, 416 U.S.

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The lower courts both applied the test in Procunier v. Martinez to the question whether Florida prison officials could exclude publications that both sides to the litigation (and the trial court) agreed were racist and inflammatory. (A19 - A22, A27 - A30, A73 - A77). The Martinez test is more stringent than the rule in Turner, and requires prison regulations to be reasonably related to a legitimate penological interest and to "be no greater than is necessary or essential to the protection of the particular governmental interest involved." Martinez, 416 U.S. at 413-414. Thus, under Martinez, a court would invalidate a regulation whose "sweep

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at 405 ("[C]ourts are ill-equipped to deal with the increasingly urgent problems of prison administrations and reform"; and Id. at note 9, "They are also ill suited to act as the frontline agencies for the consideration and resolution of the infinite variety of prisoner complaints").

is unnecessarily broad." Id. 416 U.S. at 414.

In Martinez, the only case affecting prisoners' rights in which this Court adopted a strict scrutiny test, the Court focused on the fact that more than just the rights of inmates were at issue. Martinez involved a California prison regulation permitting the censorship of inmate correspondence. This Court identified a close personal interest in such personal correspondence by both the inmate and a sender/recipient outside prison.[4]/ Deciding the case based not on the rights of inmates but the First Amendment rights

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[4]/ Inmate-to-inmate correspondence is not protected by the same strict scrutiny standard; instead it is subject to reasonable restrictions. Turner v. Safley, supra.

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of their outside correspondents, this Court said, "In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners." Martinez, 416 U.S. at 408, emphasis added. The Court found that concerning such a "particular means of communication . . . the interests of both parties are inextricably meshed." Id., 416 U.S. at 409. It is clear that Martinez turned on this court's recognition of the intimate nature of personal correspondence. In doing so, the Court used this example:

> The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him.

Id. 416 U.S. at 409.[5]/

Significantly, this Court saw a distinction between personal correspondence and written communications of other kinds: "Different considerations may come into play in the case of mass mailings." Id., 416 U.S. 409 n. 11. But since the issue was not raised in the case, the Court expressed no view on it.

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[5]/ In Turner v. Safley, 107 S.Ct. at 2265 - 2266, the court also addressed the constitutionality of a prison rule restricting the rights of inmates to marry. The court invalidated the rule on the ground that it was not reasonably related to a legitimate penological interest. However, the court suggested that the test of Martinez might have applied. Id., 107 S.Ct. at 2266. Clearly, in a marriage, the rights of the partners are "inextricably meshed": ". . .inmate marriages, like others, are expressions of emotional support and public commitment." Id., 107 S.Ct. at 2265.

Different considerations certainly do come into play when one considers the entry into prison of books and other publications. The interest of a book or magazine publisher is far different from that of a letter writer. The letter writer has a direct personal interest in having his or her letter read.[6] On the other hand, a publisher's interest is more general. While a publisher has a First Amendment right to publish, he has no specific expectation that a particular individual will read what he has published. Moreover, a prison regulation preventing a publication from circulating

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[6] "Communication by letter is not accomplished by the act of writing words on paper. Rather it is effected only when the letter is read by the addressee." Martinez, 416 U.S. at 408.

inside prison is only a minor restriction of the publisher's First Amendment rights. His work may still circulate to the public at large. The regulation at issue is not a "consequential restriction on the First and Fourteenth Amendment rights of "a nonprisoner publisher. Procunier v. Martinez, 416 U.S. at 409; Turner v. Safley, 107 S.Ct. at 2260. For the letter writer, however, exclusion of his or her letter from prison means that the person for whom it was intended never will read the message it contained. A publisher's insistence that he has a right to place a book inside a prison is little different from the notion that a television broadcasting company has a right to install television sets for inmates. However, we know of no rule that suggests that television broadcasters have a First Amendment interest in requiring that their

programs are viewed by inmates. The interests of a publisher and an inmate are not "inextricably meshed."

The lower courts did not consider these factors. Instead, they mechanically applied Martinez, reasoning that since the publications at issue were being sent in by an outsider, Martinez must be the appropriate precedent, without examining the case's underpinnings.

In so ruling, the lower courts substantially departed from controlling precedent. There is ample support in the Turner-O'Lone line to justify applying the reasonableness test rather than strict scrutiny. In that line of cases, this Court has not hesitated to apply a reasonableness test even when the First Amendment rights of non-inmates were affected by a prison rule. For example, in Block v. Rutherford, supra, this Court

upheld a ban on contact visits between pre-trial detainees on the ground there was a "valid, rational connection" between the restriction and the maintenance of internal security. Block v. Rutherford, 468 U.S. at 586. In Bell v. Wolfish, supra, this Court upheld a jail regulation prohibiting inmates from receiving books only from publishers or book clubs, a rule that implicated the First Amendment rights of private correspondents who wanted to mail books or magazines to inmates. In Pell v. Procunier, this Court reversed a court of appeals decision striking down California prison regulations prohibiting face-to-face interviews between inmates and news reporters. This Court reasoned that:

> When . . . the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative

> problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations.

Pell v. Procunier, 417 U.S. at 826.

Certainly in Pell, the First Amendment rights of the reporters were implicated. The Court permitted that restriction because the regulation was reasonably related to a need to maintain security and because reporters had alternative means of access to inmates, even if those alternatives were "unimpressive if they were submitted as justification of personal communication among members of the general public." Id., 417 U.S. at 825.

And, in the recent case of O'Lone v. Estate of Shabazz, supra, First Amendment rights of non-inmates were affected by a New Jersey prison rule prohibiting inmates on certain work squads from attending a Muslim prayer service similar in importance

to a Christian's Sunday service. We are informed by the Solicitor General that the religious services were performed by an outside Islamic minister. Petition for writ of certiorari filed by the Solicitor General, p. 15, in Meese v. Abbott, no. 87-1344, cert granted ____ U.S. ____ (April 22, 1988), citing O'Lone v. Estate of Shabazz, petitioner's brief, p. 17. The religious leader's First Amendment rights certainly were implicated by the inability of his parishioners to attend services. Yet, in that case this Court upheld the regulation as reasonably related to legitimate governmental interests.

The common element among these cases and the present one is that while First Amendment rights of outsiders were affected, the interests of free citizens were not "inextricably meshed" with those of inmates. The same deeply personal

interest present such as in personal correspondence simply was not there.

Where speech takes place is a factor to consider. In public forums, strict scrutiny applies to regulations restricting expression; in non-public forums, a regulation affecting expression does not violate the constitution if it is reasonable in light of the purpose to be served and it is viewpoint neutral. Cornelius v. NAACP Legal Defense and Education Fund, Inc. 473 U.S. 788 (1985); Perry Education Assn v. Perry Local Educators' Assn, 460 U.S. 37 (1983). Prisons are not public forums. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 134[7]/. Thus, the entry

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7/ By analyzing the issue of bulk mailings in Jones in terms of whether prisons
(Cont. on next page)

of publications should be subjected to the same reasonableness test in Turner and O'Lone.

The question of whether prison officials can exclude publications that are either entirely or partly racist and inflammatory[8]/ and reasonably likely to lead to violence is an important one to Florida and all the states. Several of the respondents' witnesses testified that racial tension is present in the Florida

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constituted public forums, this court explicitly gave further currency to the notion that written speech occurs where it is read -- here inside prison. Cf., Procunier v. Martinez, 416 U.S. at 408. As prison officials can reasonably regulate the physical entry of outsiders, Pell v. Procunier, supra, the court appeared to sanction the same sort of regulation of speech deemed to occur in prison.

8/ The respondents did not dispute that at least some of the publications at issue were racist. A19.

prison system, that anything that raises the level of tension could cause violence, and that racist literature could heighten racial tension. The district court agreed that the concerns of prison officials over the literature were reasonable. Lawson v. Wainwright, 641 F.Supp. at 323; A76. Yet, in following Martinez, the district and circuit courts imposed a greater burden on officials than this Court should require.

Furthermore, in imposing a strict scrutiny standard, the circuit and district courts substantially hampered Florida prison officials' ability to foresee and to deal with potential threats to internal security stemming from the introduction of inflammatory literature.[9]/

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[9]/ See e.g. , Jones, 433 U.S. at 132, "Responsible prison officials must be

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"The solutions to problems arising within correctional institutions will never be simple or easy." Jones, 433 U.S. at 137, Justice Burger concurring. Because prisons are populated by people who have shown their inability or refusal to conform to society's norms, "[o]f necessity, rules far different from those imposed on society at large must prevail within prison walls." Id. Justice Burger also said that federal courts should not "second guess" the decisions of prison officials except in "extraordinary circumstances." Id.

The facts of the present case do not offer extraordinary circumstances. In an

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permitted to take reasonable steps to forestall . . . a threat . . .", and Jones, 433 U.S. at 133, n. 9: "The informed discretion of prison officials that there is a potential danger may be sufficient for limiting rights even though this showing might be 'unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public.'"

atmosphere in which racial tension is prevalent and likely to lead to violence, where the First Amendment rights of outside publishers are only minimally affected, the lower courts erred in applying a strict scrutiny standard. Rather, they should have adopted the deference-based reasonableness standard embodied in Turner and O'Lone.

Because the lower courts have strayed from the path clearly marked by the Turner-O'Lone line of cases, we submit that this case warrants review by writ of certiorari. In an issue of such national importance,[10] this Court should lay to

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[10] Racist literature comes in as many forms as hate can take. Anti-white literature by a black religious group was the issue in this case. But in other federal appellate circuits, the courts have addressed the power of prison officials to
(Cont. on next page)

rest the uncertainties and misunderstandings surrounding the application of Martinez.

It appears that the Court already has recognized the importance of the issue we have raised here. Recently this Court granted the petition for a writ of certiorari brought by the Solicitor General on behalf of the U.S. Attorney General in Meese v. Abbott, docket number 87-1344. Meese presents substantially the same questions about the applicability of

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exclude publications espousing the violent racist views of anti-black and anti-Semitic hate groups such as the Aryan Nations. See e.g., Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252 (8th Cir. 1987); McCabe v. Arave, 827 F.2d 634 (9th Cir. 1987). These and other cases cited infra part III also dealt with the admission of various types of publications into prison. These courts all applied the Martinez strict scrutiny or "least restrictive means" standard. We submit that they have all misapplied Martinez and failed to understand its underlying reasoning. Thus they, too, are fundamentally in error.

Martinez to decisions regarding the entry of publications into federal prisons.

Therefore, we ask the Court to grant the petition.

II.

If Procunier v. Martinez governs this case, the lower courts misapplied it.

In Martinez, this Court actually established not a two-step test, but a three-step test. The first two steps we have already mentioned: one, that the regulation at issue must be reasonably related to a legitimate governmental interest, and two, that the regulation must be narrowly drawn.

But in dealing with in-coming or out-going inmate letters, this Court reaffirmed that courts must still defer to the

reasonable judgments of prison officials:

> This [that a regulation must be narrowly drawn] does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interest identified above [security, order and rehabilitation].

Procunier v. Martinez, 416 U.S. at 414. Emphasis added.

It is clear, then, that this Court intended that prison officials would not have to show "with certainty" that harm would result -- or had resulted -- from the admission of particular piece of writing into prison. It is enough, under Martinez, if a restriction on communication or

censorship of a document is "generally necessary" to protect security and order and to promote rehabilitation.

The circuit and the district courts took a different view, however.

At several places in its lengthy opinion, the district court pointedly noted our alleged failure to show that actual violent incidents had occurred as a result of the introduction of racist Hebrew Israelite literature into Florida prisons:[11]/

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[11]/ There is no dispute that much of the literature in question was racist and inflammatory. See panel 1st opin. p. 11. The district court said, "The Court acknowledges that persons of other races and creeds may find some or all of these publications distasteful." Lawson v. Wainwright, 641 F.Supp. at 317, n.5. Several of the witnesses for the respondents testified that they regarded the material as racist and inflammatory.

> -- The Court finds that no incident of violence, racially oriented or otherwise, has occurred within the Florida prison system as a result of the introduction of Hebrew Israelite literature . . . .

Lawson v. Wainwright, 641 F.Supp. 312, 320 (S.D. Fla. 1986); (A60).

> -- None of the defendants' witnesses, as previously noted, in these findings, testified to the occurrence of any violent incident, in any state penal system, which was traceable to the introduction of religious literature of any kind."

Id., 641 F.Supp. at 322; (A69). Emphasis added.

> -- By their failure to present any evidence of violence, disruption, or actual threats to the security and order of any institution in which one or more inmates participated in Hebrew Israelite worship and/or possessed the sect's publications, the defendants fall short of satisfying their evidentiary burden in opposing the plaintiffs' claims.

Id., 641 F.Supp at 327.

The trial court noted that prison officials cannot be held to prove with certainty that serious adverse consequences would flow from admission of the literature, but said that petitioners' witnesses' testimony amounted only to "speculative assessment of potential dangers." Id., 641 F.Supp. at 327; (A93 - A94).

The trial court's repetition of this Court's "with certainty" language was only ceremonial. In reality, the trial court was saying that unless we produced actual corpses, actual evidence of injury to inmates or prison officials, our proof would never rise above the level of "speculative assessment."

The truth is, however, that linking violent incidents directly to the introduction of a given sheet of paper is nearly impossible. The issue in the case

should have been not whether a piece of paper provoked a beating or a killing, but whether prisons are fraught with racial tensions which could be aggravated by racist literature and whether that tension can result in violence.

The cumulative effect of the testimony of the respondents' experts was that prison's harbored racial tension, that anything that heightened tension risked provoking violence, and that racist literature could heighten tension. The trial court and the circuit court chose to focus instead on the lack of proof of actual violence directly linked to the introduction of racist literature.

For example, in its first opinion, the circuit court panel said, "No evidence was adduced of any violence or disciplinary problems attributable to the activities of

these inmates related to he study or dissemination of this literature." (A13).

Later, the panel said:

> The appellees do not dispute that at least some of the literature is racist in character. They admit that some is derogatory of other races and religions. Nevertheless they showed, and the district court agreed, that the racist and derogatory religious literature is not a cause of violence or other disruption of prison life.

(A19).

The panel concluded, as had the district court, that because we showed no actual incidents of violence, our argument that racist inflammatory literature posed a threat to security amounted only a "bare assertion". (A22).

Thus, by requiring proof of actual violence stemming directly from introduction of racist literature, the lower courts compelled us to show "with certainty that adverse consequences would

flow from the failure to censor a particular" publication. The lower courts declined to consider whether our practice of restricting the entry of racist and inflammatory literature was "generally necessary to protect" security and order or to promote rehabilitation.

We submit that Martinez required the lower courts to focus on whether the racist and inflammatory literature at issue presented a potential danger -- whether it was reasonably likely to cause prison violence or threaten security and order. Because the lower courts failed to apply this standard and instead forced us to prove actual incidents of harm arising from the admission of racist literature, the decisions of the courts below were in conflict with controlling precedent of this court.

This is an issue of major importance to prison systems around the country. Racist violence comes in many forms: anti-black, anti-Semitic, anti-white. Prison officials should have the means to combat it. The lower courts deprived Florida of the ability to do so.

We ask the Court to grant the petition because of conflict with controlling Supreme Court precedent and because the case poses important issues of federal law.

III.

Not only was the decision of the circuit court in conflict with precedent of this court, but it also conflicted with decisions from other circuit courts of appeals.

The reasoning and the decision in this case conflicts with those of the following decisions of other circuit courts:

-- Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252 (8th Cir. 1987). In this case the 8th circuit invalidated a total ban on Aryan Nation (a white supremacist group) literature as being too broad to satisfy the test in Procunier v. Martinez. The court, however, would have permitted a ban "limited to those materials that advocate violence or that are so racially inflammatory as to be reasonably likely to cause violence at the prison." Id., 814 F.2d at 1257. See also Id., 814 F.2d at 1256. The court noted that the district court gave proper deference to testimony "that racially derogatory or white supremacist literature would cause increased racial unrest and

violence" at the prison. Id., 814 F.2d at 1256, n.5. See also Valiant-Bey v. Morris, 829 F.2d 1441 (8th Cir. 1987).

-- Travis v. Norris, 805 F.2d 806 (8th Cir. 1986). Applying the principles of Procunier v. Martinez, the 8th Circuit permitted the withholding of a newsletter entitled "Gorilla Law" even though there were no actual incidents of violence connected with the publication in prison. Among other things, the newsletter was "relentlessly hostile to prison officials and to authority in general", characterized prisoners as helpless victims of society and spoke of their "motivation of burning revenge." Id., 805 F.2d at 808.

-- Espinoza v. Wilson, 814 F.2d 1093 (6th Cir. 1987). The plaintiffs in this case sought admission into prison of certain homosexual publications which were

banned. The plaintiffs were gay inmates. Applying Procunier v. Martinez, the court upheld the ban. The circuit court said that the warden did not have to prove that a publication had actually caused an incident before withholding it from circulation. "[T]his court has noted that an actual danger need not be demonstrated, it is enough to show that a potential danger exists." Id., 814 F.2d at 1099.

-- McCabe v. Arave, 827 F.2d 634 (9th Cir. 1987). This was an action by members of the Church of Jesus Christ Christian, an Aryan Nation alter ego that the trial court found espoused racial hatred. The court applied the principles from Turner v. Safley and O'Lone v. Estate of Shabazz, because the issue in the case was not whether Aryan Nation literature could be admitted, but whether it could be kept in

the prison library. The court said that literature could not be banned unless it advocated violence or illegal activity or it was so racially inflammatory as to be reasonably likely to cause violence in prison. Id., 827 F.2d at 638.

-- Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980). In this case, the 5th Circuit held that barring admission into prison of a newsletter that constituted an immediate threat to prison security was not unconstitutional. The newsletter, published by a private group, approved of a work stoppage at the prison and advocated an inmates union. Following Procunier v. Martinez, the trial court found that prison officials reasonably believed that the admission of the newsletter constituted an immediate threat to security, and the

circuit court was not able to say that this was error. Id., 624 F.2d at 574.

-- Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976). In this case the circuit court said that Procunier v. Martinez did not prohibit a narrowly drawn ban on literature that may reasonably be thought to encourage violence in prison. While the court upheld the invalidation of an overbroad censorship regulation, the court said that Procunier v. Martinez did not create a clear and present danger standard. Id., 534 F.2d at 755.

-- Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987). In this case, inmate-plaintiffs challenged a Federal Bureau of Prisons regulation governing the censorship of publications. The circuit court noted that this court has never articulated a rule addressing publication censorship, but

the circuit court decided that there was no reason why the principles of Procunier v. Martinez should not apply. In examining the regulation, the court said, "Critical to both the Martinez holding and our case is the question of the required degree of probability that an expression of an idea will cause conduct destructive of security and order." Id., 824 F.2d at 1170. The court reviewed the deference language in Martinez, at 416 U.S. at 414, and concluded that a regulation authorizing censorship must be generally necessary. Abbott v. Meese, 824 F.2d at 1170. The court invalidated the regulation on vagueness grounds, holding that the words in the rule "depicts", "describes" and "facilitates" gave no clear guidance to officials as to what could be excluded. However, the court said that material that "encouraged" violence, other specified breaches of

conduct threatening security or in some way impaired rehabilitation would pass the Martinez test.

The D.C. Circuit also said that a ban on a whole publication, when only a part was offensive, was overbroad and not generally necessary to protect governmental interests. The court, however, would have approved removal of offensive passages, with admission of the rest of the text. Id., 824 F.2d at 1173-1174.

One reason the case now before the Court conflicts with Abbott v. Meese is because in Meese the circuit court approved the idea of removing parts of a publication that officials concluded threatened security. However, in the present case, the trial court disapproved of that practice. See Lawson v. Wainwright, 641 F.Supp. at 321, 329; (A99 - A102). The

circuit court did not address this aspect of our case, but its decision left the trial court's holding intact. Thus, we cannot, under the present interpretation of Martinez in the 11th Circuit and the U.S. District Court for the Southern District of Florida, remove only the part of a publication that is racially inflammatory and reasonably likely to cause violence in prison. We must admit the entire publication.

The conflicts between the cases outlined above and the present case are readily apparent. While the trial court paid lip service to the Martinez directive to defer to the judgment of prison officials as to decisions regarding the admission of individual documents, permitting banning when generally necessary, it never applied the spirit of this court's language. Instead, the

district and circuits courts required showings of actual harm directly connected with the admission of racist literature into prison. This is at odds with the holdings of Murphy v. Missouri Department of Corrections, 814 F.2d 1252 (8th Cir. 1987) and others that officials may exclude racist and inflammatory literature that is reasonably likely to cause violence in prison. As noted, in other cases, courts required only a showing of the potential for harm from the admission of literature.

Therefore, based upon these conflicts, we ask the Court to grant the petition.

CONCLUSION

In light of the arguments presented above, we ask the Court to grant the petition.

However, since this court has granted the petition for a writ of certiorari in Meese v. Abbott, Supreme Court docket number 87-1344, which involves substantially the same issues, we ask the Court to stay consideration of this case until resolution of Meese. To the extent that any decision in Meese does not resolve the issues presented in this case, we ask the Court to consider the case independently.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ROBERT LAWSON,

Plaintiff-Appellee,
Cross-Appellant,

versus

RICHARD L. DUGGER,
etc., et al.,

Defendants-Appellants,
Cross-Appellees

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5774

D.C. Docket No. 83-8409

ROBERT LAWSON,

Plaintiff-Appellee,
Cross-Appellant,

versus

RICHARD L. DUGGER,
etc., et al.,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(December 21, 1987)

Before **JOHNSON** and **ANDERSON**, Circuit Judges, and **ATKINS***, Senior District Judge.

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* **Honorable C. Clyde Atkins**, U.S. Senior District Judge for the Southern District of Florida, sitting by designation.

ATKINS, Senior District Judge:

Appellants, Florida prison officials, appeal from a judgment following a bench trial, holding unconstitutional the acts of the Florida Department of Corrections which restricted members of the class - prisoners - from access to the religious literature of the Hebrew Israelite faith and from otherwise exercising their right to religious expression within the prison context. The appellee/cross-appellants also claimed their rights to due process were violated by the appellants' regulations and procedures for the screening of incoming religious literature.

The district court found, after recounting the evidence adduced at the trial, "that no incident of violence, racially oriented or otherwise, has occurred within the Florida prison system

as a result of the introduction of Hebrew Israelite literature or the practice, by inmates, of the Hebrew Israelite religion." Memorandum Opinion at 14. The court determined that evidence which the appellants did proffer "considered of speculation and predictions by various prison officials and expert witnesses that the banned publications would (or could) engender violence among inmates." Id.

We hold, as did the district court, that the practices of the appellants in denying to appellees their rights freely to exercise their religious beliefs during their incarceration and appellants' failure to apply a standard policy protective of appellees' religious freedoms are violative of their rights under the first amendments.

The district court having properly afforded the injunctive relief sought, we affirm and remand to the district court for the purpose of requiring appellants to submit a plan for censoring literature that does not violate the procedural protections afforded by the due process clause of the fourteenth amendment.

The Facts

The district court's comprehensive recital of the facts in its findings is amply supported by the record, and we adopt the relevant portions here.

The parties to this class action have stipulated to the fact that the Hebrew Israelite faith is a bona fide religion. It has existed in splintered fashion since early in the twentieth century. The headquarters of the sect is the Temple of Love, located in Miami, Florida. It was

founded in about 1981. From this location, Yahweh ben Yahweh, who was formerly known as Moses Israel, presides as the leader of the Hebrew Israelite faithful. Among the facilities housed within the Temple is a printing complex, through which the organization prints and distributes copies of books and religious tracts which set out the tenets and history of the sect.

The Hebrew Israelite faith, as developed in the literature distributed from the Temple of Love, is directed at black Americans, although there appears to be no explicit exclusion from membership of other races. The religion teaches that all blacks living in the United States are descendants of the "lost tribe of Israel", which, it is claimed, settled in biblical times on the west coast of Africa, only to be forcibly dispersed and removed to the

Western Hemisphere by the slave trade of the seventeenth and eighteenth centuries.

Yahweh ben Yahweh, writing as Moses Israel, further instructs his followers that white society and white-dominated Jewish and Christian mainline churches have deliberately deceived American blacks since their introduction to this continent by concealing from them their true heritage as Black Hebrew Israelites. This historical/theological concept is supported in the literature by selective, and highly edited, quotations from the Hebrew Israelite Holy Bible.

By means of limited biblical quotations, often wholly rewritten, interspersed throughout the remainder of the Hebrew Israelite literature, Yahweh ben Yahweh teaches his followers that God is Black, that Moses, Abraham, Jesus Christ, and all other important biblical figures

were black, and that Yahweh ben Yahweh himself is the present incarnation of the god Yahweh. Among the practical tenets, or laws, of the faith are the belief that the Bible forbids a man to shave his beard, proscribes the use of illegal drugs and the practice of homosexuality, and requires adherence to dietary laws which forbid the eating of pork products. As do most religion, this one admonishes the faithful that prayer, study and adherence to the laws of the church are necessary to a proper life.

A central tenet of the subject religion, and one that is promoted in many of the Hebrew Israelite publications, is the belief that the "white man", in a collective sense, is the enemy of the black race, and that black people have been punished by God for their failure to adhere to the commands of Yahweh by being

subjugated by oppressive white rule. Thus, a repeated message of these materials is that white society has continually mistreated black Americans since their arrival as slaves, and that the god Yahweh, through the messianic figure of Yahweh ben Yahweh, offers the faithful salvation at some future time by leading his followers back to their homeland, Israel.

The publications of the Temple of Love which have been refused admittance by chaplains or other officials at various facilities of the Florida Department of Corrections consist of the following items, all of which were introduced in evidence at the trial of this cause:

Plaintiffs' Exhibit #4 - The Holy Bible

This publication consists of a standard, edited King James Bible, to which six prefatory pages have been added, together with eighty-six titled illustrations. While most of these

drawings serve to simply illustrate that various Biblical characters were black persons, several depict either acts of atrocity (e.g., an illustration of the multilation and killing, by white men, of a pregnant black woman and her fetus entitled "Blacks Hate Whites Forever" included at page 120 of this 1,170-page text) or constitute disparagement of so-called "false religions" (at page 1068, a mocking caricature of the Roman Catholic Pope entitled "The First Beast.")

Plaintiffs' Exhibit #5 - <u>You Are Not A Nigger - Yahweh, God of Gods</u>

In this, the most polemical of the works which the appellants have excluded from the various prisons, author Moses Israel presents "the world's best kept secret"' i.e., the lineage of black Americans as the lost tribe of Israel, as lessons to be presented to new and potential converts. The remainder of this book consists of a series of short tracts, mixing theological exhortations and slanted historical accounts of the black experience in this country, culminating in the message that the god Yahweh will return to liberate the Hebrew Israelite from domination by the "white devil."

Plaintiffs' Exhibit #6 - <u>Let My People Go</u>

This volume contains a collection of newspaper clippings of lynchings, mob attacks and other incidents of racial violence in turn-of-the-century America, letters from inmates in the Florida prison systems complaining of their inability to

practice the faith, and selected excerpts from "Your Are Not A Nigger," Plaintiffs Exhibit #5.

Plaintiffs' Exhibit #7 - 100 Years of Lynchings

In the only document not originally printed by the Temple of Love, the reader finds a roughly chronological compilation of newspaper clippings covering an eighty-year period (1870-1950) which describe various lunchings of black men and other racially motivated violence throughout the southern United States.

Plaintiffs Exhibit #7A - Divine Dietary Laws for Hebrew Israelites

The pamphlet sets out a regimen of prescribed and proscribed foods for followers of the Hebrew Israelite religion, based loosely on the Jewish dietary laws set out in the books of Leviticus and Deuteronomy. The chief practical aspect of these laws for the plaintiff class is the avoidance of pork and pork products.

Plaintiffs' Exhibit #8 - The Jail Ministry Notebook

This five-page, mimeograph pamphlet is essentially a teachers' manual for followers who wish to instruct others by means of the Hebrew Israelite texts discussed above and contains a preliminary lesson in the Hebrew language. It should be noted that the author's introduction to this guide admonishes followers of Yahweh

ben Yahweh who are inmates in state institutions to remain obedient to authorities while incarcerated.

Plaintiffs' Exhibit #9 - Yahweh Judges America

The most recent of the Temple of Love publications is a purely prophetic vision of the redemption of the black race by Yahweh ben Yahweh at an unspecified future time.

Plaintiffs' Exhibit #70 - The Lamb's Letter

This two-page form instructs the would-be convert in the proper method of registration for membership in the sect, and constitutes an application for an "Israelite name."

All of the above documents, except "Yahweh Judges America," which was released in 1985, have been sent (primarily by mail, though some copies were personally distributed by Temple elders) to one or more of the appellee class members. They were rejected by the appellants.[1]/

The worship services observed by the Hebrew Israelite inmates, when permitted, consist mainly of Bible study guided by the

biblical interpretations set out in the Temple of Love literature. Associated with these services is the wearing, by participants, of a white turban and a Star of David, the latter being customarily worn by the inmate, where permitted.

At least four members of the appellee class[2]/ have been prevented by one or more of the appellants from receiving some or all of the Hebrew Israelite literature addressed to them, and on specific occasions from practicing their preferred religion within the institutions.

The Dade Correctional Institution Chaplain has consistently prohibited receipt by inmates of the religious texts described above. In doing so, the Chaplain has notified recipients when materials were returned but has not informed them of their right to appeal to the Chaplaincy Services Coordinator. While Hebrew Israelite

prisoners are not permitted to hold unsupervised worship services, they may pray individually in the prison chapel at Dade Correctional and may wear religious medallions. There were, at the time of trial, approximately twenty Hebrew Israelite inmates at Dade Correctional Institution. No evidence was adduced of any violence or disciplinary problems attributable to the activities of these inmates related to the study of dissemination of this literature.

Drew Washington, the last of the appellees to testify, has been held in seven Florida state prisons since his commitment in 1981. While at Union Correctional Institution in late 1981, Washington was informed that all material which he had requested from the Temple of Love had been returned for the stated reason that they were "racist and

inflammatory." Washington's requests to receive visits from elders, to wear religious accessories, to meet for group study in the prison chapel, and to grow his beard in keeping with the mandate of the Holy Bible were also denied by the Union chaplain. Washington filed a grievance in response to these denials, which was itself denied. Similar blanket denials of Washington's requests to worship and to receive literature were made by the chaplains at appellants' Avon park and Belle Glade facilities during his subsequent assignments to those prisons.

While at Belle Glade, Washington and others had access to one copy of the Holy Bible and the "Yahweh, God of Gods" text (Plaintiffs' Exhibits #4 and 5), which were shared among the dozen Hebrew Israelites incarcerated there. No evidence of

violence or disruptive acts arising out of the activities of this group of inmates has been presented to the Court.

Appellants adduced evidence of two non-violent incidents which involved individual inmates who professed to follow the Hebrew Israelite faith. Melvin Smith, who was chaplain at the Lawtey Correctional Institution in February, 1984, testified that during one of several informal prayer meetings which Hebrew Israelite inmates were permitted to hold in the prison chapel, some inmates expressed concern over the racist content of some of the prayers and slogans being uttered by appellee James Evans, necessitating the curtailment of that prayer session. Chaplain Smith could not recount any other incident occurring at Lawtey which involved study or worship activities of Hebrew Israelite inmates.

Vernon Farley, a corrections officer at Marion Correctional Institution, testified that he was required to discipline a Hebrew Israelite inmate, Eugene Wade, who had engaged in a verbal altercation with another inmate. While Wade was being restrained by prison guards, he uttered threats against the officer and his family interspersed with Biblical quotations. Prior to Wade's three week stay at Marion, and after his disciplinary removal from the prison population, there were no further disciplinary problems occasioned by the religious activities of the remaining Hebrew Israelite inmates.

At all of the appellants' penal institutions, literature and worship services of recognized religion, including the Jewish, Roman Catholic, Black Muslim (Islam) and various Protestant denominations, are permitted within the

prisons, subject to oversight by the prison chaplain and in accordance with applicable prison regulations. Religious diets are also arranged upon the application by an inmate and he chaplain's determination that such request is legitimate (i.e., professing Black Muslim inmates are routinely afforded a pork-free diet).

Over a two-year period commencing February, 1982, officials in charge of the Dade County Jail[3]/ permitted elders of the Hebrew Israelite Temple of Love to come into the jail, to conduct worship services, and to distribute Hebrew Israelite literature among those prisoners who requested it. While the new faith was enthusiastically accepted by the prisoners upon its initial introduction to the Dade County Jail, with some fifty prisoners participating in worship services, interest quickly waned to the point that, within two

years, the temple representatives voluntarily ceased their visits to the county facility. No incidents of violence or disruption occurred during this two-year period which could be traced to the introduction of Hebrew Israelite literature and worship practices.

The District Court Correctly Found the Restrictions Unconstitutional

The appellants conceded in the trial that the Hebrew Israelite faith is a bona fide religion, and that the Hebrew Israelite publications, with one exception, were religious in nature. All eight publications, according to official policy, are banned from the prison in their published form. See Letter from Appellant Counselman to Yahweh ben Yahweh, Appellees' Exhibit 86. The asserted reason is that portions of each are racist and

inflammatory and pose a threat to the security and order of the Florida prison system (R5: 179-2).

The appellees do not dispute that at least some of the literature is racist in character. They admit that some is derogatory of other races and religious. Nevertheless they showed, and the district court agreed, that the racist and derogatory religious literature is not a cause of violence or other disruption of prison life.

This proof supports the opinions of the appellees' experts that racist literature will have no negative impact so long as correctional officials do not make in an issue.

1. First Amendment Implications

First amendment interests are implicated in the censorship or exclusion of literature by prison officials. In

Procunier v. Martinez, 416 U.S. 393 (1974), the Court determined the proper standard for deciding whether a particular regulation or practice relating to inmate correspondence constitutes an impermissible restraint of first amendment liberties. It held that:

> [Prison officials] must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413. The first part of the Martinez test has been refined so that the regulation or rule will be taken to further a substantial government interest if it is rationally related to that interest. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983).

The prohibition against Hebrew Israelite literature and worship services in the prison is broader than any legitimate penological objective would support. While appellants permit literature and worship services of recognized religions, including the Jewish, Roman Catholic, Black Muslim, and Protestant faiths, they prohibit them for members of the Hebrew Israelite faith. They have banned the literature because, they assert, it could engender violence among inmates, and thereby undermine prison security. They have returned literature requested by inmates for the states reasons that it is "racist and inflammatory." A restriction does not fall within the rules and regulations to which prisoners are necessarily subject if it is not neutral and without regard to content of the expression affected. Pell v. Procunier,

417 U.S. 817, 828 (1974) (citing Cruz v. Beto, 405 U.S. 319, 321 (1972). Appellants' bare assertion that the restrictions imposed on prisoners of the Hebrew Israelite faith are appropriate means to prevent potential violence among inmates will not justify a prisoner's loss of a fundamental right. Bradbury, 718 F.2d at 1543.

We affirm the injunction and do so to assure uniform and continuous application of appellants' rules and regulations consistent with the first amendment rights of the appellees.

2. Procedure for Censorship of Literature

The district court held that the challenged regulations on their face satisfy the minimal due process requirements for claims involving prisoner mail censorship established in Martinez.

The Martinez Court held:

> An inmate [should] be notified of the rejection of a letter written by or addressed by him . . . . The author of that letter [should] be given a reasonable opportunity to protest that decision, and . . . complaints [should] be referred to a prison official other than the person who originally disapproved the correspondence.

Martinez, 416 U.S. at 418-419.

The Admissible Reading Rule, Fla. Admin. Code Ann. r. 33-3.012(1987), provides that written notices by given to each inmate addressee whose books are returned, describing the publication and the rule under which it is returned. It further provides for review, within fourteenth days, by the Chaplaincy Services Coordinator (i.e., someone other than the initial decision maker). The district court concluded that "the minimal

procedural safeguards of Martinez are ostensibly provided by existing regulations." Memorandum Opinion at 37.

Appellees challenge these procedures on the grounds that they do not require (1) the Chaplain to inform the inmate of the title and publisher of the excluded publication, (2) a statement of reasons for the exclusion, (3) that the inmate be given a meaningful opportunity to be heard, (4) notice to the sender and an opportunity for that party to be heard, (5) automatic review as in the Georgia and South Carolina procedures and (6) a time standard for deciding appeals.

We are constrained to hold that the cause be remanded to the district court on this issue, for the submission by the appellants of a plan for censoring literature, in accordance with the procedural due process requirements set forth in Martinez. We are concerned with

the deficiency in the procedures applied when literature is excluded, including, but not limited to the failure of the Admission Reading Rule to provide notice and opportunity to the sender to protest the exclusion, and the reasons for the exclusion.

AFFIRMED in part and REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5774

ROBERT LAWSON,

Plaintiff-Appellee,
Cross-Appellant,

versus

RICHARD L. DUGGER,
etc., et al.,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(March 3, 1988)

ON PETITION FOR REHEARING

Before JOHNSON and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

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*Honorable C. Clyde Atkins, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

The appellants' petition for rehearing obviously failed to understand that this appeal does not solely address "prisoners' rights." Consequently, Turner v. Safley, 107 S.Ct. 2254 (1987), and O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987), do not govern the present appeal. Turner and O'Lone addressed the standard of review in cases involving prisoners' rights. The present appeal, as was the case with Procunier v. Martinez, 416 U.S. 396 (1974), concerns more than prisoners' rights; it also concerns the First Amendment rights of the Temple of Love.

Martinez expressly reserved the proper standard of review to apply in cases involving questions of "prisoners' rights." In Turner, the Supreme Court definitively provided the proper standard of review: "[W]hen a prison regulation

impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 107 S. Ct. at 2261 (emphasis added). O'Lone simply applied this lenient standard to prisoners' free exercise claims.

This more lenient standard of review does not apply to the present appeal because the constitutional rights of nonprisoners are at issue. Post-Martinez Supreme Court precedent does not suggest otherwise. Indeed, even Turner recognized the dichotomy in standards of review depending upon whose rights are at issue:

> [W]e note initially that the regulation prohibits marriages between inmates and civilians, as well as marriages between inmates. Although not urged by respondents, this implication of the interests of nonprisoners may support application of the Martinez standard, because the regulation may entail a

> "consequential restriction on the [constitutional] rights of those who are not prisoners."

107 S. Ct. at 2265-66 (quoting Martinez, 416 U.S. at 409) (citation omitted).

In addition, the D.C. Circuit's post-Turner decision in Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987), supports the conclusion that Martinez, rather than Turner, provides the governing standard here. In Abbott, the D.C. Circuit noted: "Although in Turner, the court rejected application of the stricter Martinez standard to regulation of correspondence between inmates, we conclude that it did not overrule or restrict Martinez as applied to situations where the First Amendment rights of non-inmates are involved." Id. at 1170 n.1 (emphasis added). See also Sturm v. Clark, 835 F.2d 1009, 1013-14 (3d Cir. 1987) (Martinez, rather than Turner, provided governing

standard of review for attorney's First Amendment claim regarding access to prisoners).

In conclusion, we properly selected Martinez as the controlling standard and properly applied the Martinez standard in the present case. Consequently, the appellants' petition for rehearing is DENIED. We DIRECT the Clerk of the Court to incorporate our explanation associated with this denial of the appellants' petition for rehearing as part of the panel opinion in this case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 83-8409-Civ-ARONOVITZ

ROBERT LEE LAWSON, on
behalf of himself and all
others similarly situated,

Plaintiffs,

vs.

LOUIE L. WAINWRIGHT, et al.,

Defendants.
_____/

MEMORANDUM OPINION
INCLUDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS CAUSE came on for a non-jury trial before the Court commencing Monday, May 19, 1986 and was heard over a five day period. The Court received extensive pre-trial memoranda, heard the testimony of twelve expert and fifteen lay witnesses, and the argument of counsel for the parties. In addition, the Court has closely examined the numerous exhibits

offered by the parties. On June 9, 1986, the parties submitted post-trial memoranda presenting their view of the applicable legal standards to be applied by the Court in this matter.

THE COURT, having carefully considered all of the evidence presented, the pertinent portions of the record, the various memoranda of law, the argument of counsel, and the applicable law, and being otherwise fully advised in the premises, enters herein its memorandum opinion containing findings of fact and conclusions of law.

THE NATURE OF THE ACTION

This is a statewide class action which challenges the alleged refusal by officials of the Florida Department of Corrections to permit inmates in the Department's penal institutions who profess adherence to the

Hebrew Israelite faith to receive the religious literature of that faith and to engage in the practice of the Hebrew Israelite religion in the manner allowed to inmate members of other religious groups.

The plaintiff class, as certified by the Court's Order of January 2, 1986 is defined as:

> All persons currently confined, or who will be confined in the future, in institutions operated by Florida's Department of Corrections and who are members of, or seek to learn about, the Hebrew Israelite faith and who desire to receive and discuss religious literature prepared by the Temple of Love, and who have been denied, the opportunity to receive such religious literature, discuss such religious beliefs with other individuals, and worship according to the tenets of the Hebrew Israelite faith.

Count I of the plaintiffs' Amended Complaint challenges, on First Amendment grounds, the Department of Corrections'

refusal to permit those inmates who profess to follow the Hebrew Israelite faith from receiving religious books and pamphlets published by the Temple of Love, which is the Miami headquarters of the sect. Count I further alleges that the defendants have prevented the plaintiffs from enjoying the free exercise of their religion, by prohibiting worship services, prayer meetings, observance of dietary laws, and the wearing of religious symbols.

In Count II, the plaintiff class claims that their rights to equal protection and due process of law have been abridged by the procedures utilized by the defendants, under color of state regulations, in circumscribing the plaintiffs' religious practice in violation of the Fourteenth Amendment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

Procedural History

1. On August 5, 1983, Robert Lee Lawson, then an inmate at Hendry Correctional Institution, filed a pro se verified complaint in this Court pursuant to 42 U.S.C. §1983 suing Louie L. Wainwright, Secretary, Florida Department of Corrections, C.W. Sprouse, Superintendent at Hendry, L.G. Stephens, Educational Supervisor, and Stephen Spencer, the prison chaplain.

2. The complaint charged, inter alia, that the plaintiff was a black Jew and a member of the Temple of Love, and that the plaintiff was informed on June 28, 1983 that religious literature addressed to plaintiff from the Temple of Love was being returned by the Hendry prison chaplain.

The complaint sought declaratory, injunctive and monetary relief.

3. On March 12, 1985, plaintiff Lawson, now represented by counsel, filed his First Amended Complaint, naming Secretary Louie L. Wainwright, Chaplaincy Services Coordinator William S. Counselman, C. W. Sprouse, Paul Coburn and Stephen Spencer as defendants.[1]/ The Amended Complaint sought, inter alia, declaratory and injunctive relief on behalf of the class members and damages only as to plaintiff Robert Lee Lawson.

4. Defendants' Motions to Dismiss and for Summary Judgment were denied on October 9, 1985. They filed their Answer on October 25, 1985.

5. On April 12, 1985, Lawrence Jones, an inmate at the Dade Correctional Institution, moved to join as a party plaintiff or to intervene. On October 9,

the Court permitted Lawrence Jones to join as a party plaintiff.

6. After an evidentiary hearing the Court, on January 2, 1986, certified this cause as a class action, defining the plaintiff class as described above.

7. There are currently 31 correctional institutions under the control and supervisions of the Florida Department of Corrections. Evidence presented to the Court indicates that the number of inmates within those institutions who are either practicing Hebrew Israelites or have expressed a desire to learn about the religion is between 75 and 100.[2]/

8. Robert Lee Lawson was released from incarceration in May, 1985 and is no longer a member of the class. His complaint for monetary damages against the defendants pursuant to 42 U.S.C. §1983, originally Count III of the Amended

Complaint in this cause, has been severed from this class action which seeks only declaratory and injunctive relief.

The Court's Findings

9. The parties to this class action have stipulated to the fact that the Hebrew Israelite faith is a bona fide religion. It has existed in splintered fashion since early in the twentieth century. The headquarters of the sect is the Temple of Love, located in Miami, Florida, and it was founded in about 1981. From this location, Yahweh ben Yahweh, who was formerly known as Moses Israel, presides as the leader of the Hebrew Israelite faithful. Among the facilities housed within the Temple is a printing complex, through which the organization prints and distributes copies of books and religious tracts which set out the tenets and history of the sect.

10. The Hebrew Israelite faith, as developed in the literature distributed from the Temple of Love[3]/, is directed at black Americans, although there appears to be no explicit exclusion from membership by other races. The religion teaches that all blacks living in the United States are descendants of the "lost tribe of Israel", which, it is claimed, settled in biblical times on the west coast of Africa, only to be forcibly dispersed and removed to the Western Hemisphere by the slave trade of the seventeenth and eighteenth centuries.

Yahweh ben Yahweh, writing as Moses Israel, further instructs his followers that white society and white-dominated Jewish and Christian mainline churches have deliberately deceived the American blacks, since their introduction to this continent, by concealing from them their true heritage as Black Hebrew

Israelites. This historical/theological concept is supported in the literature by selective, and highly edited, quotations from the Hebrew Israelite Holy Bible.[4]/

By means of limited biblical quotations, often wholly rewritten, interspersed throughout the remainder of the Hebrew Israelite literature, Yahweh ben Yahweh teaches his followers that God is black, that Moses, Abraham, Jesus Christ, and all other important biblical figures were black, and that Yahweh ben Yahweh himself is the present incarnation of the god Yahweh. Among the practical tenets, or laws, of the faith are the belief that the Bible forbids a man to shave his beard, proscribes the use of illegal drugs and the practice of homosexuality, and requires adherence to dietary laws which forbid the eating of pork products. As do most religions, this one admonishes the faithful

that prayer, study and adherence to the laws of the church are necessary to a proper life.

11. A central tenet of the subject religion, and one that is promoted in many of the Hebrew Israelite publications, is the belief that the "white man", in a collective sense, is the enemy of the black race, and that black people have been punished by God for their failure to adhere to the commands of Yahweh by being subjugated by oppressive white rule. Thus, a repeated message of these materials is that white society has continually mistreated black Americans since their arrival as slaves, and that the god Yahweh, through the messianic figure of Yahweh ben Yahweh, offers the faithful salvation at some future time by leading his followers back to their homeland, Israel.

12. The publications of the Temple of Love which have been refused admittance by chaplains or other officials at various facilities of the Florida Department of Corrections consist of the following items, all of which were introduced in evidence at the trial of this cause:

Plaintiffs' Exhibit #4 - The Holy Bible

This publication consists of a standard, edited King James Bible, to which six prefatory pages have been added, together with eighty-six titled illustrations. While most of these drawings serve to simply illustrate that various Biblical characters were black persons, several depict either acts of atrocity (e.g., an illustration of the mutilation and killing, by white men, of a pregnant black woman and her fetus entitled "Blacks Hate Whites Forever" included at page 120 of this 1,170-page text) or constitute disparagement of so-called "false religions" (at page 1068, a mocking caricature of the Roman Catholic Pope entitled "The First Beast").

Plaintiffs' Exhibit #5 - You Are Not a Nigger- Yahweh, God of Gods

In this the most polemical of the works which the defendants have excluded from the various prisons, author Moses Israel presents "the world's best kept secret"; i.e., the lineage of black Americans as the lost tribe of Israel, as lessons to be presented to new and potential converts. The remainder of this book consists of a series of short tracts, mixing theological exhortations and slanted historical accounts of the black experience in this country, culminating in the message that the god Yahweh will return to liberate the Hebrew Israelite from domination by the "white devil".

Plaintiffs' Exhibit #6 - Let My People Go

This volume contains a collection of newspaper clippings of lynchings, mob attacks and other incidents of racial violence in turn-of-the-century America, letters from inmates in the Florida prison system complaining of their inability to practice the faith, and selected excerpts from "You Are Not A Nigger", Plaintiffs' Exhibit #5.

Plaintiffs' Exhibit #7 - 100 Years of Lynchings

In the only document not originally printed by the Temple of Love, the reader finds a roughly chronological compilation of newspaper clippings covering an eighty-year period (1870-1950) which describe various lynchings of black men and other racially motivated violence throughout the southern United States.

Plaintiffs' Exhibit 7A - Divine Dietary Laws for Hebrew Israelites

This pamphlet sets out a regimen of prescribed and proscribed foods for followers of the Hebrew Israelite religion, based loosely on the Jewish dietary laws set out in the books of Leviticus and Deuteronomy. The chief practical aspect of these laws for the plaintiff class is the avoidance of pork and pork products.

Plaintiffs' Exhibit #8 - The Jail Ministry Notebook

This five-page, mimeograph pamphlet is essentially a teachers' manual for followers who wish to instruct others by means of the Hebrew Israelite texts discussed above and contains a preliminary lesson in the Hebrew language. [It should be noted that the author's introduction to this guide admonishes followers of Yahweh ben Yahweh who are inmates in state institutions to remain obedient to authorities while incarcerated.]

Plaintiffs' Exhibit #9 - Yahweh Judges America

The most recent of the Temple of Love publications is a purely prophetic vision of the redemption of the black race by Yahweh ben Yahweh at an unspecified future time.

Plaintiffs' Exhibit #70 - The Lamb's Letter

This two-page form instructs the would-be convert in the proper method of registration for membership in the sect, and constitutes an application for an "Israelite name."

All of the above documents, except "Yahweh Judges America", which was released in 1985, have been sent (primarily by mail, though some copies were personally distributed by Temple elders) to one or more of the plaintiff class members and were rejected by the defendants. 5./

13. The worship services observed by the Hebrew Israelite inmates, when permitted, consist mainly of Bible study guided by the biblical interpretations set out in the Temple of Love literature. Associated with these services is the

wearing, by participants, of a white turban and a Star of David, the latter being customarily worn by the inmate, where permitted, at all times. Practice of the faith also requires that adherents observe a pork-free diet in accordance with the Divine Dietary Laws.

14. At least four members of the plaintiff class 6./ have been prevented by one or more of the defendants from receiving some or all of the Hebrew Israelite literature addressed to them, and on specific occasions from practicing their preferred religion within the institutions.

15. Plaintiff James Evans has been an adherent of the Hebrew Israelite religion during the last five years of his incarceration at various institutions within the Florida prison system. In 1982,

Evans was placed in the Union Correctional Institution after pre-trial detention in the Dade County Jail, where Evans was converted to the Hebrew Israelite faith by elders of the Temple of Love who were permitted to conduct services in that county facility and to distribute the temple's books.

Upon his arrival at Union Correctional Institution, Evans requested receipt of Hebrew Israelite publications and for permission to hold religious services and to obtain a pork-free diet. When these requests were denied by the prison chaplain 7./, Evans filed a grievance appeal on August 5, 1982. 8./ During the course of this grievance appeal, a neutral attorney fact-finder was appointed, who concluded that "the prohibition of such literature is unsupported by any factual evidence and is thus inconsistent with Department [of

Corrections] rules and existing practices." Factfinder's Report, Grievance Appeal of James Evans, Case No. U82-82 (Plaintiffs' Exhibit #15). Evans' appeal was ultimately denied by the Department on January 24, 1983, and he was not permitted to practice his faith nor receive the rejected literature while incarcerated at Union.

After a transfer to the defendants' Avon Park facility in April, 1983, Evans was permitted by the chaplain there to participate in Hebrew Israelite worship services and to obtain copies of the Holy Bible and "You Are Not a Nigger" (Plaintiffs' Exhibits #4 and 5). At Lawtey Correctional Institution, to which Evans was subsequently transferred, no Hebrew Israelite books or worship were permitted. When Evans attempted to hold unsupervised prayer meetings with fellow

followers at Lawtey, he was retransferred to Union Correctional. Upon attempting to convene inmates for a prayer meeting while at Union, Evans was transferred to Florida State Prison, which houses the state's Death Row and its most troublesome maximum security inmates. The chaplain assigned to Florida State Prison also prevented Evans from receiving any requested religious literature.

Evans was finally retransferred to Union Correctional Institution in the fall of 1985. There, Evans possessed copies of Plaintiffs' Exhibits #4 and 5 and shared these with other Hebrew Israelites, but all requests for additional materials were refused. On three occasions in 1986, Evans was mailed religious works (twice by the Temple of Love and once by his wife). In each case, the materials were rejected by chaplain Eldon Cornett, the Supervising

Chaplain at Union, or by his assistant, H. Wayne Priest, on the ground that "the book(s) has many racist and inflammatory statements." Plaintiffs introduced into evidence three internal memoranda written by Cornett or Priest to defendant Counselman notifying him of the rejections and the stated reasons therefore. (Plaintiffs Exhibits #92-94) Although inmate Evans received copies of these cursory notices, they gave no hint of the nature of the rejected material and did not advise the inmate of any direct means of appeal from these adverse decisions.

Thus, at Union Correctional Institution (on three separate occasions) and at Lawtey, all of plaintiff Evans' requests for opportunities to study and to practice the religion of his choice were denied, while at Avon Park and in the Dade County Jail, the identical literature and worship

methods were permitted and caused no incidents of violence or disruption. On no occasion when Evans' requests for Hebrew Israelite materials were denied was Evans' informed of his right to appeal the local chaplain's decisions directly to the Chaplaincy Services Administrator. 9./

16. David Lucas, another member of the plaintiff class, has been incarcerated at the Florida State Prison since September 21, 1981, and became an adherent of the Hebrew Israelite faith in that year. His request to receive the Holy Bible (Plaintiffs' Exhibit #4) and the Divine Dietary Laws (Plaintiffs' Exhibit #7A) was denied by the prison chaplain, although Lucas was allowed to possess for some time while at Florida State Plaintiff's Exhibit #5, "You Are Not A Nigger". During 1984, plaintiff Lucas made requests to be placed on a religious, pork-free diet and to

receive visits from Temple of Love elders, which were likewise denied. Some prisoners at this institution currently possess one or more of the banned publications in spite of the chaplain's practice of returning them upon receipt. No evidence of violence or disruption traceable to the introduction or use of this literature in the Florida State Prison was presented to the Court.

17. Plaintiff Lawrence Jones adopted the Hebrew Israelite religion prior to his incarceration in the Florida state prison system in April, 1981. After a short stay at Dade Correctional Institution, where receipt of Hebrew Israelite literature was prohibited, Jones was transferred to Belle Glades Correctional Institution, where he enjoyed access to such materials in the possession of other inmates. During his latest stay at Dade Correctional, commencing in December, 1983, Jones

requested and obtained a visit by one of the elders of the Temple of Love, who was not allowed to conduct a formal service, but did engage in pastoral visits with three inmates.

The Dade Correctional Institution chaplain has consistently prohibited receipt by inmates of the religious texts described in Paragraph 10, supra, and in doing so has notified recipients when materials were returned but has not informed them of their right to appeal to the Chaplaincy Services Coordinator. While Hebrew Israelite prisoners are not permitted to hold unsupervised worship services, they may pray individually in the prison chapel at Dade Correctional and may wear religious medallions. There were, at the time of trial, approximately twenty Hebrew Israelite inmates at Dade Correctional Institution. No evidence was

adduced of any violence or disciplinary problems attributable to the activities of these inmates related to the study or dissemination of this literature.

18. Drew Washington, the last of the plaintiff inmates to testify, has been held in seven Florida state prisons since his commitment in 1981. While at Union Correctional Institution in late 1981, Washington was informed that all materials which he had requested from the Temple of Love had been returned for the stated reason that they were "racist and inflammatory". The plaintiff's requests to receive visits from elders, to wear religious accessories, to meet for group study in the prison chapel, and to grow his beard in keeping with the mandate of the Holy Bible were also denied by the Union chaplain. Washington filed a grievance in response to these denials, which was itself

denied. Similar blanket denials of Washington's requests to worship and to receive literature were made by the chaplains at defendants' Avon Park and Belle Glades facilities during his subsequent assignments to those prisons.

While at Belle Glades, Washington and others had access to one copy of the Holy Bible and the "Yahweh, God of Gods" text (Plaintiffs' Exhibits #4 and 5), which were shared among the dozen Hebrew Israelites incarcerated there. No evidence of violence or disruptive acts arising out of the activities of this group of inmates has been presented to the Court.

19. Defendants adduced evidence of two non-violent incidents which involved individual inmates who professed to follow the Hebrew Israelite faith. Melvin Smith, who was chaplain at the Lawtey Correctional Institution in February, 1984, testified

that during one of several informal prayer meetings which Hebrew Israelite inmates were permitted to hold in the prison chapel, some inmates expressed concern over the racist content of some of the prayers and slogans being uttered by plaintiff James Evans, necessitating the curtailment of that prayer session. Chaplain Smith could not recount any other incident occurring at Lawtey which involved study or worship activities of Hebrew Israelite inmates.

Vernon Farley, a corrections officer at Marion Correctional Institution, testified that he was required to discipline a Hebrew Israelite inmate, Eugene Wade, who had engaged in a verbal altercation with another inmate. While Wade was being restrained by prison guards, he uttered threats against the officer and his family interspersed with Biblical quotations.

Prior to Wade's three week stay at Marion, and after his disciplinary removal from the prison population, there were no further disciplinary problems occasioned by the religious activities of the remaining Hebrew Israelite inmates.

20. At all of the defendants' penal institutions, religious literature and worship services of recognized religions, including the Jewish, Roman Catholic, Black Muslim (Islam) and various Protestant denominations, are freely allowed within the prisons, subject to oversight by the prison chaplain and in accordance with applicable prison regulations. 10./ Religious diets are also arranged upon the application by an inmate and the chaplain's determination that such request is legitimate (i.e., professing Black Muslim inmates are routinely afforded a pork-free diet.)

21. Over a two-year period commencing in February, 1982, officials in charge of the Dade County Jail 11./ permitted elders of the Hebrew Israelite Temple of Love to come into the jail, to conduct worship services, and to distribute Hebrew Israelite literature among those prisoners who requested it. While the new faith was enthusiastically accepted by the prisoners upon its initial introduction to the Dade county Jail, with some fifty prisoners participating in worship services, interest quickly waned to the point that, within two years, the temple representatives voluntarily ceased their visits to the county facility. No incidents of violence or disruption occurred during this two-year period which could be traced to the introduction of Hebrew Israelite literature and worship practices.

22. The Court finds that no incident of violence, racially oriented or otherwise, has occurred within the Florida prison system as a result of the introduction of Hebrew Israelite literature or the practice, by inmates, of the Hebrew Israelite religion. The evidence which the defendants did proffer at trial consisted of speculation and predictions by various prison officials and expert witnesses that the banned publications would (or could) engender violence among inmates.

23. By an order entered by the United States District Court for the Middle District of Florida on April 20, 1971 in Moore v. Tompkins (Case No. 69-263-CIV-J and cases consolidated therewith), the Florida Department of Corrections was required to permit the introduction into Florida State Prison of texts and periodicals of the Black Muslim faith. In

the opinion of several expert witnesses proffered by both sides, the Black Muslim literature, as it existed in 1971, was very similar in content and ideological perspective to the Hebrew Israelite literature at issue here. None of the defendants' witnesses were able to recount any incidents of violence or disruption, racially motivated or otherwise, which could be attributed to the introduction of Black Muslim literature on or after April 20, 1971 at the Florida State Prison. In fact, Vernon Fox, one of defendants' religion experts, testified that the only violent disturbance within a Florida prison which was in any way related to the distribution of religious literature was caused by the exclusion of that literature by prison authorities.

24. In August of 1985, William E. Counselman, Chaplaincy Services Administrator for the Florida Department of Corrections, convened a meeting of chaplains from all of the department's corrections facilities. Among other subjects discussed at this meeting, Counselman stressed the need for a uniform application of the regulations and policies of the Department of Corrections by the chaplains at the various state prisons. At that meeting, Counselman communicated the announced policy of the Department that prison chaplains were to treat all religions held by inmates in an even-handed manner. Counselman testified that this policy dictated the allowance of a pork-free diet to sincere Hebrew Israelites, as well as access to chapel facilities, the wearing of non-contraband religious insignia, and the arrangement of visits by

recognized elders of the faith, provided that no specific risk to security was presented by these activities.

25. On September 16, 1985, Counselman addressed a letter (Plaintiffs' Exhibit 86) to the Hebrew Israelite leader, Yahweh ben Yahweh, in response to the latter's September, 1981 inquiry as to the admissibility of Hebrew Israelite publications in the state prisons. Counsel stated in this letter that all of the books in question (Plaintiffs' Exhibits #4,5,6,7,7A,8 and 70) would be admissible provided that specified illustrations and text portions were removed together with "all derogatories [sic] comments concerning other faiths and religions". The Counselman letter also expressed the Department's position that Hebrew Israelite inmates are to be afforded the same opportunity to practice their faith as is

given to members of other recognized religions, including the right to hold prayer meetings and to attend worship services conducted by Temple elders in accordance with standardized procedures for such visits (e.g., elders must first visit with the prison chaplain and describe the nature of the proposed service.)

26. The Court finds that, prior to the August, 1985 chaplains' meeting convened by Administrator Counselman, there was unquestionably sporadic and uncoordinated application of prison regulations and policies among the Florida prison officials in their dealings with Hebrew Israelite inmates.

The same lack of uniformity is apparent in those instances in which written explanations were provided to inmates for the rejection of religious literature addressed to them. Examples of the varied

rationales relied upon for the refusal to admit these publications include assertions that they are "derogatory to other faiths and races" (Plaintiffs' Exhibit #86), were the subject of pending litigation (Plaintiffs' Exhibit #16,17), espouse a "philosophical position . . . which tends to be inflammatory, derogatory and racist" (Plaintiffs' Exhibit 29), were "disapproved by chaplain" (Plaintiffs' Exhibit #31), are "racially inflammatory" (Plaintiffs' Exhibits #33,68) or "would seriously affect the good order and operation of the facility and jeopardize security." (Plaintiffs' Exhibit #75)

On two occasions, the rejection of the religious literature was predicated on inapplicable department regulations. Jim Annis, chaplain of the Hendry Correctional Institution in June, 1981, returned Hebrew Israelite material to the Temple of Love on

the stated ground that it was not "on the approved list of periodicals for inmates." 12./ (Plaintiffs' Exhibit #34). The later rejection, by Union Correctional chaplain Eldon Cornett, of fourteen copies of the Temple of Love Publication "Our True History - The World's Best Kept Secret" on August 4, 1982 (Plaintiffs' Exhibit #68) addressed to plaintiff Drew Washington was predicated on the Department of Corrections Routine Mail Rule, Fla. Admin. Code §33-3.04 because it was "racially inflammatory and derogatory to the Christian faith." In fact, the Routine Mail Rule in effect at that time provided (in pertinent part) that incoming mail may only be restricted where it contains "information which, if communicated, would create a clear and

present danger of violence and physical harm to a human being." Fla. Admin. Code §33-3.04(6)(c) (emphasis added).

Since the August, 1985 Chaplains' Meeting covered by Rev. Counselman, there has been a bona fide effort to accommodate, through uniform policies, the religious practices of Hebrew Israelite inmates. Nevertheless, application of these policies remains sporadic, due, at least in part, to the fact that the Chaplaincy Services policies have not been adequately communicated to the individual prison chaplains. Thus, there is no uniform policy, applied and maintained at all of the defendants' institutions, which protects the constitutional rights at issue here.

27. The testimony of several expert witnesses in the fields of religion and prison administration was presented to the

Court. Allyn Sieloff, former Director of the Pennsylvania Department of Corrections, testified for the plaintiffs that during his tenure in that position (1968-73), the introduction of strident Black Muslim literature into the Pennsylvania prisons was resisted at first, but that its eventual introduction had only positive effects on the security and discipline of the prisons. Sieloff, along with Dr. Richard Swanson of the University of Florida Department of Psychology, expressed the opinion that the study of, and adherence to, a religious system would tend to improve inmates' self-image and decrease the likelihood of violence.

The defendants, in turn, presented a series of expert and fact witnesses, predominantly corrections officers and chaplains from the Florida and other state prison systems, who expressed the uniform

opinion that the Hebrew Israelite literature at issue in this cause is "racist and inflammatory" and would present a threat to the security and order of any prison institution in which it was introduced. None of the defendants' witnesses, as previously noted in these findings, testified to the occurrence of any violent incident, in any state penal system, which was traceable to the introduction of religious literature of any kind.

28. The Court finds that none of the publications admitted into evidence as Plaintiff's Exhibits Nos. 4, 5, 6, 7, 7A, 8, 9 and 10 contain subject matter which, when taken as a whole and in its entirety, "advocates or encourages riot, insurrection, escape, disruption of the institution, violence or violation of law or Department or institution rule . . ." or

"otherwise presents a clear and substantial threat to the security, order or rehabilitative objectives of the Correctional System, or to the safety of any person." Fla. Admin. Code §§33-3.12(6).

29. The Court further finds that the religious practices and observances which the plaintiffs seek to require the defendants to permit are not of a nature which would encourage or incite violence, escape or disruption, or in any way threaten the legitimate interests of the Department of Corrections in the security and order of the correctional institutions under its supervision.

II. Conclusions of Law

1. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331 and 1343(3). The plaintiffs' cause of action is predicated on 42 U.S.C. §1983. The declaratory judgments sought herein are authorized by 28 U.S.C. §§2201 and 2202. Attorney's fees, costs and expenses are authorized by 42 U.S.C. §1988.

2. While a great degree of deference must ordinarily be accorded to the reasoned policy decisions of prison administrators, the courts must nonetheless discharge their duty to protect fundamental rights of prisoners which are violated by the application of a prison regulation or policy. Procunier v. Martinez, 416 U.S. 396, 405-06, 94 S.Ct. 1800, 1807-08 (1974).

3. Likewise, although it is well established that a prison inmate's enjoyment of constitutional rights may be

circumscribed, where required, by the legitimate governmental interests of the prison administration, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804 (1974).

4. In Count I of their amended complaint, the plaintiff class seeks declaratory and injunctive relief from various practices and regulations of the defendants which, they allege, violate their rights to free exercise of the Hebrew Israelite religion under the First and Fourteenth Amendments. Count II seeks relief from the alleged deprivation by defendants of the plaintiffs' right to procedural due process caused by the manner in which the defendants have reviewed, and

subsequently rejected, religious literature addressed to the plaintiffs and various requests for permission to worship in a manner permitted other religious prisoners.

5. The validity of a state regulation, or a particular application thereof, which restricts or prohibits an inmate's exercise of a fundamental right must be evaluated under the "least restrictive means" standard. Shabazz v. Barnauskas, Nos. 84-3803, 85-3042, 85-3046, slip op. (11th Cir. June 10, 1986); Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983).

In Shabazz, the Court of Appeals applied a less restrictive means test to a prisoner's claim that the Florida State Prison's "no beard rule" violated his right to freely exercise the Islamic faith, which forbids male members from shaving their facial hair. The court affirmed the district court's ruling that the "no beard

rule" was not violative of the plaintiff's First Amendment rights because there existed no less restrictive means to accomplish the prison administration's legitimate policy goal of ensuring positive identification of its inmate population.

In Bradbury v. Wainwright, supra, in which the Court of appeals for this circuit established the "less restrictive means" test as the standard for deciding prisoners' constitutional claims, the court reversed a district court's grant of summary judgment in favor of defendant Louie L. Wainwright upon a prisoner's claim that Florida Department of Corrections regulations which severely limit a prisoner's right to marry were violative of the First and Fourteenth Amendments' guarantees of freedom of association and privacy.

Defendants in the instant case urge this Court to adopt a "rational relation" standard of review in deciding the claims of the plaintiff class. Likewise, the defendants in Bradbury urged the appellate court to uphold the challenged regulations merely upon a showing that they were "reasonably related to an important governmental interest". The Bradbury court, however, construing the applicable Supreme Court rulings in Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974) and Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532 (1977), held that such a standard was overly deferential to the prison authorities where a prisoner's fundamental rights were implicated. From those authorities, the Court of Appeals established the following two-part test, to

be applied with a "wide-ranging deference to the expert judgment of prison administrators":

> First, the prison regulation must further a substantial governmental interest. A regulation will be taken to further such an interest if it is rationally related to it.
>
> Second, a regulation's restriction on [a fundamental right] must be no greater than necessary to protect the governmental interest involved.

Bradbury, supra, 718 F.2d at 1543.

Defendants are able to satisfy the first prong of this "less restrictive means" test, given its undemanding "rational relation" standard. It is clear that the defendant's practice of routinely banning the religious literature at issue in this case bears a rational relation to the substantial governmental interest of avoiding strife among inmates. As to the second prong of the Bradbury test, however,

the Court concludes, for the reasons discussed hereafter, that the outright ban of the literature is a greater than necessary restriction on the plaintiffs' right to freely exercise their religion.

The defendants in the present class action have urged this Court to defer to the reasoned judgment of the defendant prison officials in their decision to ban the publications and various religious practices associated with the Hebrew Israelite faith. According to the defendants, "[O]nly a showing that the corrections officials did not make a reasoned decision would justify this Court substituting its judgment for that of the corrections officials." Defendants' Trial Memorandum (Supplement), page 3, citing Jones v. North Carolina Prisoners' Union, Inc., 433 U.S. at 125, 97 S.Ct. at 2535 (1977).

The authorities cited by the defendants in support of this deferential standard are simply not apposite in the instant case. To begin with, in Jones, supra, the case most heavily relied upon by defendants in this context, the Supreme Court itself acknowledged that "First Amendment rights are barely implicated in this case", 433 U.S. at 130, 97 S.Ct. at 2540, noting that the challenged regulation affected only one of several methods of communication by prisoners, having no effect on the content of those communications.

In other cases cited by defendants, the challenged prison regulation involved activities which do not rise to the level of fundamental rights. For instance, Jersawitz v. Hanberry, No. 85-8434, slip op. (March 10, 1986) and Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800 (1974), which do hold to a virtual "abuse

of discretion" standard in evaluating prison regulations, involved content-neutral restrictions imposed upon representatives of the news media who sought to interview individual prisoners. These holdings were thus based on the respective courts' findings that alternate means of communication with the press remained available and that the restrictions were applied to all inmates in the prison in a neutral fashion. Such cases are obviously distinguished from that which is before this court, since the Hebrew Israelite inmates incarcerated in Florida's prisons have no alternate means to acquire the desired literature, and the censorship of their literature is anything but content-neutral. (See also Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979), in which the Court upheld a content-neutral restriction on the receipt

by inmates of hard-cover books, but which allowed prisoners to receive the identical texts in paperback form, on the ground that hard covers provided opportunities for concealment of weapons and contraband.)

Thus, in each case cited by the defendants in support of their contention that a mere "rational relationship" between the challenged prohibitions and a legitimate governmental interest is sufficient to defeat the plaintiffs' claims, there was not the subjective, content-based censorship of pure religious speech that is evidenced in the instant case. Because the regulations challenged here allow censorship based solely on the subjective evaluation of prison officials, and because plaintiffs have no available alternative in exercising their religion or in obtaining desired literature, the "less restrictive means" test is the proper

standard by which to evaluate the plaintiffs' claims.

6. Count I of the plaintiffs' amended complaint alleges that the policies and procedures followed by the officials of the Florida Department of Corrections impermissibly violate the First Amendment rights of inmates in that system who seek to study and to worship according the Hebrew Israelite faith. Specifically, the plaintiffs allege that their right to free exercise of their chosen faith is violated by the following actions of the defendants:

1.) The exclusion from the state prisons of Hebrew Israelite literature

2.) The prohibition on gathering of Hebrew prisoners for the purpose of engaging in prayer and discussion.

3.) The prohibition, in some institutions, against prisoners wearing a "Star of David", the adopted symbol of the Hebrew Israelite faith

4.) The unavailability, to some plaintiffs, of a pork-free diet

5.) The prohibition against inmates owning and using prescribed head coverings

6.) The failure of various prison chaplains to arrange for visits to the prisons by recognized elders of the Hebrew Israelite faith

This pattern of resistance by chaplains throughout the Florida prisons is indicative of a bias against, or, at best, a grudging acceptance of, the Hebrew Israelite religion by the individual chaplains, the pervasive nature of which necessitates the Court's intervention in this dispute.

The resistance which led up to the instant litigation is best illustrated by the following extracts from defendants' post-trial brief:

> The Florida Department of Corrections recognizes that the Hebrew Israelite faith is religious in nature. This is not to place an imprimatur upon

> the Hebrew israelites in that other organizations such as satanic cults and white supremacist groups also contain this character. However, the Hebrew Israelite faith while recognized as a religion and, therefore, afforded that status within The Florida Department of Corrections is not necessarily approved of by the chaplains or chaplaincy services of the Department of Corrections in that it is felt that the Hebrew Israelite faith is damaging to the rehabilitative objectives of the institution.

Defendants' Post-Trial Brief at pp. 23-24.

In other words, the individual conflicts which culminated in the instant lawsuit arose as much from the philosophical approach taken by chaplains within The Florida Department of Corrections as it did from any substantive or legal differences. This approach has led to the anomaly that the defendants proffer, on the one hand, that they would admit the Hebrew Israelite literature once all "objectionable portions" were removed, while maintaining the position that the

religion, in its totality, is itself objectionable. Even up to the time of trial in May, 1986, there existed only a grudging acceptance among responsible officials of the department regarding the Hebrew Israelite faith as expressed by inmates under their supervision.

The same "approach" over "substance" attitude is evident in the defendants' justification to their initial wholesale ban of the contested literature.

> The Department of Corrections does not necessarily object to a single phrase in any one of the Hebrew Israelite publications but rather to the overall racist flavor of the literature which the individual phrases and comments give it.

Id. at 21.

7. Based on the representations of the defendants, through counsel, made during the trial of this cause, in their closing argument, and again in their post-trial

brief (in which the defendants were specifically requested by the Court to set out the Department of Corrections' current policy on the matters at issue), the Court has made the following compilation of relevant state policies:

1.) On the exclusion of religious literature

> "The religious literature of The Hebrew Israelites is admissible into the institutions of the Department of Corrections so long as the portions of those documents which have been determined to violate the regulations of the admissible reading rule §33-3.012(6)(c) and (e) are removed in order to give them a benign character."

Defendants' Post-Trial Brief at p. 20.

2.) On the gathering of inmates for prayer and discussion

> "It is the policy of The Florida Department of Corrections that religious services, prayer meetings and the like should be permitted to all inmates regardless of their nature but always within the constraints of the need for the maintenance of security within the institution."

Id. at 26-27.

3.) On the availability of a pork-free diet

"It is the policy of The Department of Corrections that this [dietary] regulation should apply equally to the Hebrew Israelites as to any other religious group within the institutions and that the Hebrew Israelite inmates, once they have identified themselves as Hebrew Israelites be provided with the type of religious meal which is possible under the constraints of the regulation noted above and which their religious teachers state is appropriate for their faith."

Id. at 24-25.

4.) On the holding of formal religious services within the prisons

See Number 2.), supra, for departmental policy on religious worship services and prayer meetings.

5.) On wearing religious headdress

"[T]he wearing of religious headdresses, etc., is permissible during religious services. . . . The wearing of religious headgear, such as turbans, would be normally restricted to the religious services themselves."

Id. at 27-28.

6.) On the wearing of religious medallions

> "The wearing of religious medallions is permitted within the institutions of The Department of Corrections [but such items] must be obtained through proper channels and may not be made of contraband material in violation of other regulations of the Department of Corrections."

Id. at 28.

7.) On the observance of religious holidays

> The Department shall make an effort "to arrange work assignments and schedules to accommodate the beliefs and practices of inmates whose religion requires them to abstain from work on religious holydays," but cautions that practical considerations may require limitations on this privilege.

Id. at 30.

A careful review of the stated policy of the department, in light of the factual background of this class action, has led the Court to conclude that progress has

been made since the filing of this suit in August, 1983. A significant step forward was achieved at the August, 1985 Chaplains' Meeting referred to previously, where the director of chaplaincy services imparted the Department's position on many aspects of this suit directly to the individuals responsible for its implementation in the prisons. To the extent that these policies are consistent with the Court's instant Order, the policies and recommended remedial actions of the defendants are accepted within the totality of this opinion.

However, there still exist substantial communication problems and/or failure to implement uniformly the announced departmental policies. To the extent that the recent policy of accommodation regarding Hebrew Israelite inmates has been applied, it has been on a selective basis

(i.e., implementation by some chaplains in favor of some groups). Thus, although treatment of religious minorities in the Florida prisons has distinctly improved, the current implementation of these regulations and policies as applied to Hebrew Israelite inmates does not satisfactorily safeguard the fundamental rights of those individuals to exercise their religious beliefs.

8. The primary ground for the plaintiffs' suit, and that which occupied the central place in this litigation, is the challenge to the constitutionality of the defendants' exclusion of virtually all of the Temple of Love publications which have been mailed to inmates in the Florida prisons over the past five years. 13./

The stated basis upon which the defendants justify this exclusion is Rule 33-3.12 of the Florida Administrative Code,

entitled "Admissible Reading Material". Under subsection 33-3.12(1)(b) of this administrative rule, authority to review publications of a religious nature is assigned to the prison chaplain or his designee. Thus, in each instance relevant to this action, the initial decision to prohibit the introduction of Hebrew Israelite literature was made by the prison chaplain at the institution where the addressee was incarcerated. 14./

The Admissible Reading Material Rule does not give a local chaplain unbridled discretion in deciding whether certain literature is suitable for introduction to the prison; instead, the rule sets out the following criteria, inter alia, for review.

Reading material shall be disapproved if it:

(c) is dangerously inflammatory in that it advocates or encourages riot, insurrection, escape, disruption of the institution, violence or violation of law or Department or institution rule, the violation of which would present a serious threat to the security order, or rehabilitative objectives of the institution;

or

(e) otherwise presents a clear and substantial threat to the security or rehabilitative objectives of the correctional system, or to the safety of any person.

Fla. Admin. Code, §33-3.12(6)(c), (e) (emphasis added)

Thus, by its own regulation, the Department of Corrections may exclude religious literature only where it is shown that the excluded book or periodical "aqvocates or encourages riot, insurrection, escape, etc." or "otherwise presents a clear and substantial threat" to the legitimate government objective of safety, security and rehabilitation.

9. There has been no evidence presented to the Court, either in the course of trial or by pre-trial submissions of deposition testimony and exhibits, to justify the defendants' refusal, under the above-cited regulation, of Plaintiffs' Exhibits #4, 5, 6, 7, 7A, 8, 9 and 70. The documents do not, on their face, advocate or encourage any unlawful or disruptive actions by inmates (or any other person), and no testimony was presented which would suggest that their introduction and use within the prisons presents a "clear and substantial threat" to any of the defendants' legitimate penological goals.

On the contrary, the evidence shows that, in those institutions in which the subject literature was made available to inmates (either officially or

surreptitiously), no incidents of violence or disciplinary problem occurred which could be attributed to the use of these documents for study and worship.

10. By their failure to present any evidence of violence, disruption, or actual threats to the security and order of any institution in which one or more inmates participated in Hebrew Israelite worship and/or possessed the sect's publications, the defendants fall short of satisfying their evidentiary burden in opposing the plaintiffs' claims. While it is well settled that prison administrators cannot be held to prove with certainty that serious adverse consequences will follow the introduction of literature or religious practices into the prison environment, Martinez, supra, 416 U.S. at 414, 94 S.Ct. at 1811, neither may the defendants defeat

the plaintiffs'claims of constitutional deprivation by speculative assessment of potential dangers. 15./

The former Fifth Circuit, in Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978) ruled as unconstitutional portions of the Texas Department of Corrections' prison regulations applied to bar the receipt by inmates of publications which prison administrators considered "inflammatory". 16/ In reversing the district court's decision in favor of the Texas Corrections Department, the Court noted:

> This Court has traditionally viewed alleged inflammatory publications as a whole, and has sustained prisoners' requests to receive them when there was no direct incitement to physical violence. At the same time, we have cautioned that a demonstrated inflammatory effect might permit prison officials to withhold the publications.

> Significantly, in the present case, Texas prison officials' complaints were never keyed to demonstrated incitement to physical violence . . .

Id. at 760-61, n. 7. (emphasis added).

In a more recent prison censorship decision, the Fifth Circuit has reiterated its requirement in Guajardo that prison officials must satisfy their evidentiary burden by a showing of "proven objective factors". Hernandez v. Estelle, No. 85-2057 (unpublished) (5th Cir. May 9, 1986). In affirming the trial court's denial of injunctive relief which would have mandated the distribution in the Texas prisons of "antiwhite" publications, the Fifth Circuit relied upon the defendants' showing of "established turmoil in the Texas Department of Corrections immediately preceding and during the time that the

episode of censorship took place", including riots, work stoppages, and inmate occupation of prison facilities. Id.

In the instant case, as noted in the above findings of fact, the defendants are unable to point to a single instance of violence or disruption in any of the Florida prisons which demonstrate a relationship between the banned religious items and the recited threats to security and order within the Florida Department of Corrections. The Court has found that the only two such "incidents" for which evidence was adduced involved inmates James Evans and Eugene Wade (see paragraph 17, supra), whose disciplinary problems appear to have stemmed more from their personal characteristics than from any influence of the banned literature. This conclusion is supported by the fact that, as soon as each of these disruptive inmates was removed

from the institution in which the altercations occurred, the remaining Hebrew Israelite inmates continued their activities without further incident.

11. This Court's requirement that the prison authorities come forward with some objective evidence to justify the outright ban of religious activities of inmates, and that any such restriction be accomplished by the "least restrictive means", is not new to this Circuit. In Rudolph v. Locke, 594 F.2d 1076 (5th Cir. 1979), a prisoners' suit which challenged an Alabama regulation prohibiting prisoners from receiving written communications while confined in segregation units, the former Fifth Circuit declared that the state's "bare assertion that the regulation 'is an appropriate means of maintaining security . . . in the segregation units' is not enough. It must adduce specific evidence to support that

assertion, and it must explain why this regulation is preferable to other possible measures which restrict first amendment rights less severely." Id. at 1077.

12. Count I of the Amended Complaint alleges that the defendants' misapplication of the regulations which govern review of incoming religious literature has resulted in the unconstitutional deprivation of their protected liberty interests under the First Amendment's free exercise clause.

While the regulations, on their face, conform to the constitutional requirements of minimal procedural due process, Procunier v. Martinez, supra, the practice of the defendants in restricting First Amendment freedoms under the guise of these facially valid rules has resulted in repeated violations of inmates' substantive rights.

Based on the above analysis, the Court undertakes the following two-part inquiry in ascertaining the validity of the plaintiffs' constitutional claims herein:

1.) Is the absolute prohibition of the Hebrew Israelite publications, in their unredacted form, the least restrictive means of protecting the state's interest in security and order within the prisons?

2.) Has the state demonstrated, by objective evidence, that the publications and religious practices prohibited by the Department of Corrections are substantially detrimental to those interests?

13. As to the first inquiry, the defendants have not attempted to propose any less restrictive means than their prior outright ban of the literature and of various incidents of Hebrew Israelite worship. Such a posture may be based in their contention, maintained throughout

this litigation, that the Bradbury/Shabazz "less restrictive means" test is not applicable to this cause. Defendant Counselman, however, in his September 16, 1985 letter to Moses Israel (Yahweh ben Yahweh), did propose to admit the contested publications, on condition that they be substantially abridged so as to remove any text or illustration considered objectionable to himself, as spokesman for the Department of Corrections.

It is not the role of the state's administrative officials, nor of this Court, to engage in a process of selective censorship of constitutionally protected publications. The Court turns for guidance on this question of censorship, as a potential less restrictive alternative to outright prohibition of objectionable books and periodicals, to the well-developed jurisprudence governing permissible state

regulation of allegedly obscene publications. In the seminal case of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), the Supreme court set out its well-known three-part test which, in essence, requires a reviewing court to evaluate each publication "taken as a whole."

In the case of books and periodicals, the Miller standard means that a reviewing court may not single out discrete portions or separate articles of a publication but must consider each publication in its entirety. Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1367 (5th Cir. 1980) (and cases cited therein).

Since selective censorship of the Hebrew Israelite texts is not permissible, and since the state has proposed no workable less restrictive method to ensure security and order should the publications

be admitted to the prisons, the Court concludes that the prison chaplains' refusals to allow members of the plaintiff class to receive those publications (and to enjoy all other religious privileges accorded to recognized faiths within the prison system) violates the plaintiffs' right to free exercise of the religious faith of their choice as guaranteed by the First and Fourteenth Amendments. 17./

The Court's ruling here is equally grounded on its finding of fact, and as a matter of law, that the defendants have completely failed to show, by any objective evidence, that the introduction of the Hebrew Israelite literature and/or the allowance to Hebrew Israelite inmates of the full range of worship opportunities enjoyed by members of other faiths would "encourage or advocate riot, insurrection, escape, disruption, violence or violation

of [applicable] rules" or would present any "clear and substantial threat" to prison security. See Fla. Admin. Code 33-3.12(6)(c) and (e), and paragraphs 8 and 9 of these Conclusions of Law, supra.

14. Count II of the plaintiffs' Amended Complaint seeks declaratory and injunctive relief on the ground that the Department of Corrections regulations governing receipt of religious reading material and opportunities for worship 18./ are unconstitutionally vague in that they fail to provide inmates with adequate notice of the nature of rejected material and do not inform them of the availability of alternative grievance procedures available through the chaplaincy services office. Furthermore, plaintiffs allege that the defendants' failure to follow their own existing regulations and procedural guidelines deprives the

plaintiff class of due process and equal protection of the law.

The Court concludes that, in light of the foregoing ruling, it need not reach the issue of the alleged denial of equal protection and procedural due process rights caused by the defendants' application of the challenged regulations. These regulations, on their face, satisfy the minimal due process requirements for claims involving censorship of prisoner mail established in Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974). There the Court ruled that:

> An inmate [should] be notified of the rejection of a letter written by or addressed by him . . . The author of that letter [should] be given a reasonable opportunity to protest that decision, and . . . complaints [should] be referred to a prison official other than the person who originally disapproved the correspondence.

Id. at 418-19, 94 S.Ct. at 1814.

The Admissible Reading Rule, Fla. Admin. Code 33-3.12, provides, on its face, that written notice be given to each inmate addressee whose books are returned, describing the publication and the rule under which it is returned. It further provides for review, within fourteen days, by the Chaplaincy Services Coordinator (a person other than the initial decision maker.) Thus, the minimal procedural safeguards of Martinez are ostensibly provided by existing regulations.

Plaintiffs further assert, and defendants admit, that the existing regulations have not been uniformly implemented by officials at the various state prisons. Therefore, the defendants will be held to their representation, at trial and in their post-trial memorandum, that the Hebrew Israelite faith shall

henceforth be recognized by the Florida Department of Corrections as a bona fide religion and that its members be afforded the same opportunities to worship and utilize the chaplaincy services as are available to other religious inmates. The defendants shall further be required to apply all applicable regulations in an even-handed manner to Hebrew Israelite members incarcerated in all institutions under the authority and control of the Department of Corrections.

15. By reason of the aforegoing, the Court makes the following declarations and determination of rights.

The previous practices of the defendants in denying to members of the plaintiff class their rights to freely exercise their religious beliefs during their incarceration in institutions of the Florida Department of Corrections, as fully

set out hereinabove, and the defendants' failure to apply a standard policy protective of plaintiffs' religious freedoms, are hereby DECLARED to have violated, and to continue to violate, the plaintiffs' rights under the First Amendment to the Constitution. It is thereupon

ORDERED and ADJUDGED that the defendants in this case be, and the same are ENJOINED from denying to the plaintiff class members their right to freely exercise the Hebrew Israelite faith while incarcerated in any of the Florida Department of Corrections Institutions in accordance with the Court's instant Order. Specifically, the defendants are hereby ORDERED as follows:

> (1.) the Hebrew Israelite shall be recognized as a bona fide religion by the Florida Department of Corrections and by the 44 individual chaplains employed by the Department of

Corrections, who shall afford the Hebrew Israelite inmates the same rights and privileges regarding religious activities that are enjoyed by inmates of other faiths.

(2.) to admit into each state penal institution, where an inmate has received, either solicited or unsolicited, by mail or by personal delivery, a copy or copies of any or all of the publications previously identified as Plaintiffs' Exhibits 4, 5, 6, 7, 7A, 8, 9 and 10, subject to reasonable inspection of such books for contraband or weapons.

(3.) to permit the study of the Hebrew Israelite faith, and the use of chapel facilities for the purpose of such study or prayer by individual inmates or by groups of inmates, provided that no inmate assumes a supervisory or leadership role in such prayer and study sessions in violation of applicable regulations prohibiting inmates from assuming authority over other inmates.

(4.) to permit each professing Hebrew Israelite inmate who so desires to wear on his person a religious medallion such as the "Star of David" provided such medallion is legally obtained by the inmate and that it is neither so sharp-edged as to constitute a weapon nor made from contraband material.

(5.) to afford all requesting inmate members of the class a pork-free diet upon request.

(6.) to allow all requesting inmate members of the class the opportunity to wear religious headdresses during formal worship services arranged through the prison chaplain and conducted by Temple elders or other authorized leaders.

(7.) to require individual prison chaplains to undertake reasonable efforts to contact members of the Temple of Love nearest to each prison and to encourage elders of the Hebrew Israelite faith to visit the prisons to hold worship services and pastoral visits.

While some of the foregoing have been adopted as policy by the defendants, implementation of such policy shall henceforth be carried out uniformly through the Department of Corrections. It is further

ORDERED and ADJUDGED that the plaintiffs be awarded the costs of this litigation, pursuant to a bill of costs to be filed with the Court within THIRTY (30)

DAYS HEREFROM. Costs shall be taxed by the Clerk of the Court.

The plaintiffs may file an application for attorneys' fees, under 42 U.S.C. §1988, together with affidavits. If this method of application is not satisfactory to the parties, the court will hold a hearing on the issue of attorneys' fees. The parties are encouraged to confer in an attempt to agree on an amount representing reasonable attorneys' fees, without a concession by defendants that attorneys fees are allowable unless or until appellate rights are exhausted as to that matter.

16. Final Judgment, consistent with this decision, shall be separately entered.

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this _____ of _____, 1988.

SIDNEY M. ARONOVITZ
UNITED STATES DISTRICT JUDGE

Copy furnished to:

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FOOTNOTES

1. Defendant Stepen Spencer was dismissed without prejudice by the Court on May 19, 1986 upon the plaintiffs' failure to furnish proof of service of process.

2. Defense counsel stated at the hearing on plaintiffs' Motion for Class Certification held on December 6, 1985, that it estimated the Hebrew Israelite population at 75. Abishag Israel, a member of The Temple of Love staff in charge of correspondence with prisoners, testified that she has corresponded with between 75 and 100 inmates within the Florida Corrections System.

3. See description of the contested publications at paragraph 12, infra.

4. The nature and import of these illustrations is discussed at paragraph 12, infra.

5. The Court acknowledges that persons of other races and creeds may find some or all of these publications distasteful. It is not, however, the role of this Court to evaluate these items by their effect upon the sensibilities of some persons, but rather to decide, weighing the plaintiffs' interests under the Constitution against the legitimate governmental interests of the state, whether their admission to the prisons is constitutionally mandated.

6. The Court finds that these four inmates (James Evans, David Lucas, Lawrence Jones and Drew Washington) are sincere in their

belief in and desire to practice the Hebrew Israelite religion.

7. Incoming religious literature addressed to an inmate is to be screened according to the procedure set out in the Department's Admissible Reading Material rule, Fla. Admin. Code §33-3.12, which provides, in pertinent part:

(1)(b) Religious materials shall be subject to the provisions of this rule, except that:

> 1. Religious publications shall not require inclusion in the Approved Periodical List,
>
> 2. The institutional chaplain, rather than the superintendent or his designee, shall be the reviewing authority, and
>
> 3. Any decision of a chaplain disapproving a religious publication may be appealed to the Chaplaincy Services Coordinator within 14 days of notice of the disapproval.

This regulation does not require that an inmate be informed of this alternative appeal route, nor of the nature of the rejected book or periodical.

8. The Florida Administrative Code, at Chapter 33, Section 3.07, establishes a general grievance procedure through which an inmate, by completing a standardized grievance form, may object to a denial of privileges, a disciplinary action, etc.

Plaintiff Evans, and most other inmates, followed this general grievance procedure in objecting to the refusal of various prison chaplains to admit the Hebrew Israelite books because they were unaware of the availability of the Rule 33-3.12 appeal.

9. The availability of this alternate appeal procedure is noted in Rule 33-3.12. Evidence was presented to the Court that copies of all pertinent regulations are available to inmates in the prison library. However, there is no standardized form available to inmates who wish to pursue this avenue of appeal, as exists for the widely used 3.07 grievance.

10. The defendants justified their prohibition on unsupervised gatherings of Hebrew Israelite inmates for study or prayer by citing rule 33-3.02(10), which provides: "No inmate or group of inmates shall be given control or authority over other inmates."

11. The Dade county Jail is not under the authority or supervision of defendant Louie L. Wainwright and the Florida Department of Corrections, but is a county facility housing predominantly maximum security pretrial detainees whose average length of confinement is 34 days.

12. Fla. Admin. Code § 33-3.04 explicitly provides that religious literature is exempted from the approved reading list requirement.

13. See Findings of Facts, paragraph 12, supra.

14. A pervasive aspect of this lawsuit, and a compelling reason for the Court's grant of certification as a class action, has been the lack of uniformity among the chaplains at the various state prisons in their interpretation and application of departmental regulations. At an earlier stage of this litigation, in fact, counsel for the defendants informed the Court that, absent such certification, any ruling of the Court would be applied only to the individual inmate litigant, thus inviting repetitive prisoner suits.

15. In a decision based on remarkably similar factual and legal issues, the former Fifth Circuit in Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969), reversed the trial court's ruling that exclusion of Black Muslim religious literature from the Texas prisons could be sustained solely upon the subjective impression of the prison warden that such materials were "inflammatory,." The censored materials consisted of two editions of the periodical "Muhammed Speaks", which featured evocative depictions of blacks being subjected to torture by whites which were similar, if not identical, to the Hebrew Israelite literature objected to here. Id. at 28, n.7. Because the Walker court found that the challenged publications contained no direct incitement to the Black Muslim reader to engage in any physical violence, the district court's finding that the materials were inflammatory was held to be clearly erroneous.

16. The publications at issue here were periodicals written for and by prisoners and ex-prisoners, such as "The Penal Digest International." The printed motto of the magazine, printed on the cover of each volume, was "Our life's mission is to be impatient - to push social progress a little faster than it is prepared to go." Id at 760.

17. The instant ruling in no way restricts the defendants' power to take appropriate disciplinary measures, in accordance with established prison procedures, in cases where an inmate's abuse of his or her religious rights presents a real threat to the security and order of the institution. Such a "less restrictive means" of maintaining order was successfully applied to inmate Eugene Wade without intruding upon the religious freedoms of peaceful prisoners.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-8409-Civ-ARONOVITZ

ROBERT LEE LAWSON
et al.,

Plaintiffs,

vs.

FINAL JUDGMENT

LOUIE WAINWRIGHT,
et al.,

Defendants.
_____/

THE COURT, under even date herewith has issued its Memorandum Opinion Including Findings of Facts and Conclusions of Law after conducting a non-jury trial in the above-captioned cause. Pursuant to the findings and conclusions rendered in the Memorandum Opinion and for the reasons therein stated, it is

ORDERED, ADJUDGED and DECREED that Final Judgment shall be entered as follows:

1. The Class to which this Final Judgment applies has been defined by the Court as follows:

> All persons currently confined, or who will be confined in the future, in institutions operated by Florida's Department of Corrections and Hebrew Israelite faith and who desire to receive and discuss religious literature prepared by the Temple of Love, and who have been denied the opportunity to receive such religious literature, discuss such religious beliefs with other individuals, and worship according to the tenets of the Hebrew Israelite faith.

2. The previous practices of the defendants in denying to members of the plaintiff class their rights to freely exercise their religious beliefs during their incarceration in institutions of the Florida Department of Corrections, as fully set out in the Court's Memorandum Opinion, and the defendants' failure to apply a standard policy protective of plaintiffs' religious freedoms, are hereby DECLARED to

have violated, and to continue to violate, the plaintiffs' rights under the First Amendment to the Constitution.

3. The defendants are hereby enjoined from taking any further actions in violation of the First Amendmernt rights of members of the plaintiff class who wish to practice the Hebrew Israelite religion in the state prisons. The defendants are therefore specifically ORDERED:

1.) the Hebrew Israelite faith shall be recognized as a bona fide religion by the Florida Department of Corrections and by the 44 individual chaplains employed by the department, who shall afford to Hebrew Israelite inmates the same rights and privileges regarding religious activities that are enjoyed by inmates of other faiths.

2.) to admit into each state penal institution, where an inmate has received, either solicited or unsolicited, by mail or by personal delivery, a copy or copies of any or all of the publications previously identified as Plaintiffs' Exhibits 4, 5, 6, 7, 7A, 8, 9 and 10, subject to

reasonable inspection of such books for contrabank or weapons.

3.) to permit the study of the Hebrew Israelite faith, and the use of chapel facilities for the purpose of such study or prayer by individual inmates or by groups of inmates, provided that no inmate assumes a supervisory or leadership role in such prayer and study session in violation of applicable regulations prohibiting inmates from assuming authority over other inmates.

4.) to permit each professing Hebrew Israelite inmate who so desires to wear on his person a religious medallion such as the "Star of David" provided such medallion is legally obtained by the inmate and that it is neither so sharp-edged as to constitute a weapon nor made from contraband material.

5.) to afford all requesting inmate members of the class a pork-free diet upon request.

6.) to allow all requesting inmate members of the class the opportunity to wear religious headdresses during formal worship services arranged through the prison chaplain and conducted by Temple elders or other authorized leaders.

7.) to require individual prison chaplains to undertake reasonable efforts to contact members of the Temple of Love nearest to each prison and to encourage elders of the Hebrew Israelite faith to visit the prisons to hold worship services and pastoral visits.

While some of the aforegoing have been adopted as policy by the defendants, implementation of such policy shall henceforth be carried out uniformly through the Department of Corrections.

4. The existing regulations of the Department of Corrections, on their face, satisfy the minimal procedural due process requirements of the Fourteenth Amendment.

5. Neither the Court's Memorandum Opinion nor this Final Judgment apply to Count III of the initial Complaint. That Court, which states the individual claim of Robert Lee Lawson for monetary damages, was severed from this class action and will be addressed by the Court at a later time.

6. The plaintiffs shall recover from the defendants, jointly and severally, their costs for this litigation, to be taxed by the Clerk of this Court upon a bill of costs to be filed by the plaintiffs within THIRTY (30) DAYS HEREFROM.

7. The plaintiffs may apply for an award of attorneys' fees pursuant to 42 U.S.C. §1988 under the terms set out in the Court's Memorandum Opinion entered under even date herewith.

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 18 day of JULY, 1986.

/s/
SIDNEY M. ARONOVITZ
UNITED STATES DISTRICT JUDGE

Copy furnished to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-8409-Civ-ARONOVITZ

ROBERT LEE LAWSON
et al.,

Plaintiffs,

vs. AMENDMENT TO FINAL JUDGMENT

LOUIE WAINWRIGHT,
et al.,

Defendants.
_____/

It has been directed to this Court's attention that there are two scrivener's errors or omissions in the Final Judgment heretofore entered by this Court under date of July 18, 1986. Accordingly, it is

ORDERED and ADJUDGED that the said Final Judgment is hereby MODIFIED and AMENDED as follows:

1. In page 1, the Class to which it applies is corrected to read as it did in the Order Certifying a Class Action, and elsewhere in these proceedings as follows:

"All persons currently confined, or who will be confined in the future, in institutions operated by Florida's Department of Corrections and who are members of, or seek to learn about, the Hebrew Israelite faith and who desire to receive and discuss religious literature prepared by the Temple of Love, and who have been denied the opportunity to receive such religious literature, discuss such religious beliefs with other individuals, and worship according to the tenets of the Hebrew Israelite faith."

2. Page 2, paragraph number 3., subparagraph 2.), should read as follows:

"to admit into each state penal institution where an inmate has received, either solicited or unsolicited, by mail or by personal delivery, a copy or copies of any or all of the publications previously identified as Plaintiffs' Exhibits 4, 5, 6, 7, 7A, 8, 9 and 10, subject to reasonable inspection of such books for contraband or weapons."

In all other respects and as hereby modified, the Final Judgment entered herein under date of July 18, 1986 be and the same

is hereby RATIFIED, AFFIRMED and APPROVED as the Final Judgment of this Court.

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 25 day of JULY, 1986.

/s/
SIDNEY M. ARONOVITZ
UNITED STATES DISTRICT JUDGE

Copy furnished to:

Randall C. Berg, Jr., Esquire and
Peter M. Siegel, Esquire
Florida Justice Institute, Inc.

and

Carl H. Zahner, Asst. Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RECORD EXCERPTS has been furnished by U.S. Mail to Randall C. Berg, Esquire, Florida Justice Institute, Inc., New World Tower - Suite 3030, 100 North Biscayne Boulevard, Miami, Florida 33132-2305, on this 30th day of March, 1987.

/s/
CARL J. ZAHNER

NO. 87-1994

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

RICHARD L. DUGGER, et al.,

Petitioners,

vs.

ROBERT L. LAWSON, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

---

* PETER M. SIEGEL, ESQ.
RANDALL C. BERG, JR., ESQ.

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ATTORNEYS FOR RESPONDENTS

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QUESTION PRESENTED

Whether the censorship of religious publications, allegedly because they are racist and inflammatory and a threat to prison security, can be sustained in the absence of any objective evidence that religious literature, even racist religious literature, has ever been the cause of violence or other prison disruption in any prison, anywhere in the country?

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OPINIONS BELOW

The initial decision of the court of appeals is reported as Lawson v. Dugger, 840 F.2d 781 (11th Cir. 1987). The decision on rehearing is reported at 840 F.2d 779 (11th Cir. 1988).

The decision of the district court is reported as Lawson v. Wainwright, 641 F. Supp 312 (S.D. Fla. 1986).

References in this brief are to both the official citations and the Appendix prepared by the petitioners.

NO. 87-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

RICHARD L. DUGGER, et al.,

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ROBERT L. LAWSON, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This statewide class action arose when chaplains employed by the Florida Department of Corrections refused to recognize the Hebrew Israelite faith as a bona fide religion, refused to permit inmates who were members of the Hebrew Israelite faith the

same privileges afforded to inmates of other, recognized religions, and excluded from the prison system the religious literature of the Hebrew Israelite faith.

The primary issue litigated before the district court involved the exclusion of eight Hebrew Israelite publications. The rationale for their exclusion was that they were inciteful [sic], racist, inflammatory and derogatory toward other races and faiths and posed a threat to the security of the Florida prison system.[1] Defendants excluded a standard version of the King James edition of the Bible, to which six prefatory and eighty-six titled illustrations were added. In describing the six (6) pictures which led defendants to exclude the Bible, the district court stated:

---

1. Respondents agree that portions of some of the literature are racist. They have never agreed that any of the material is inflammatory and take exception to statements in the Petition for a Writ of Certiorari to that effect. Nor, for that matter, did the district court or the circuit court ever conclude that any of the literature was inflammatory.

> While most of these drawings serve to simply illustrate that various Biblical characters were black persons, several depict either acts of atrocity (e.g., an illustration of the mutilation and killing, by white men, of a pregnant black woman and her fetus entitled "Blacks Hate Whites Forever" included at page 120 of this 1,170 page-text) or constitute disparagement of so-called "false religions" (at page 1068, a mocking caricature of the Roman Catholic Pope entitled "The First Beast".)

641 F. Supp. at 316; A42.

Two of the excluded publications contained absolutely no offensive material. In this category were The Jail Ministry Notebook[2] and The Lamb's Letter. One item, the Divine Dietary Laws for Hebrew Israelites, was excluded because of two sentences buried on page 22 of this 29 page booklet.[3]

---

2. Defendants excluded the Notebook because of a caption on page 3 which read: "Instructions for handling the Jesus Christ Freak." Thereafter followed two paragraphs instructing Hebrew Israelites to tell Christians they were entitled to their own opinions and further instructing Hebrew Israelites that they were not to engage in debate about their interpretation of scripture.

3. In a section entitled "Read Labels" the (fn. cont. next page)

The defendants excluded Let My People Go primarily because it reprinted newspaper clippings about racial violence in turn-of-the-century America.[4] They excluded 100 Years of Lynching for much the same reason. Yahweh Judges America was excluded without any stated reason.[5]

---

booklet began: "We must forever keep in mind as Hebrew Israelites, that this white man is the beast, the devil, satan, the man of sin and our enemy according to the holy word of the bible. Therefore, he cannot be trusted." There followed a lengthy discussion of the harmful nature of food additives and shellfish.

4. The major portion of this publication consisted of letters from Florida inmates complaining of their inability to practice their religion while in prison. The defendants also censored this publication because of a reference on page 34 to the white man as "Satan", because of a sentence on page 47 reading "The FALSE JEW is in our land today because we are blind, deaf, dumb, ignorant and dead to the WHOLE TRUTH", and because of a letter, on page 70, supposedly from the "Office of Nigger Extermination."

5. Defendants had not identified what portions of this book led to its exclusion, despite having a copy four months before trial. According to the district court, this "most recent of the Temple of Love publications is a purely prophetic vision of the redemption of the black race by Yahweh ben Yahweh at an unspecified future time." 641 F. Supp. at 317; A45.

The only publication with substantial racist content is entitled You Are Not a Nigger - Yahweh, God of Gods. According to the district court:

> In this, the most polemical of the works which the defendants have excluded from the various prisons, author Moses Israel presents "the world's best kept secret"; i.e., the lineage of black Americans as the lost tribe of Israel, as lessons to be presented to new and potential converts. The remainder of this book consists of a series of short tracts, mixing theological exhortations and slanted historical accounts of the black experience in this country, culminating in the message that the god Yahweh will return to liberate the Hebrew Israelite from domination by the "white devil".

641 F. Supp. at 316; A43. Defendants objected to 26 of its 96 pages because of words and phrases appearing on those pages such as "FALSE RELIGION OF CHRISTIANITY"; "White people who call themselves Jews today are FALSE IMPOSTERS"; "evil, wicked white devil"; "evil wicked white beast"; "blue-eyed white devil"; "Our HEBREW fathers were brutally manhandled and forced to submit to examination by the scrutinizing eyes of a

cold, vicious, evil, wicked, blood thirsty, white slave trader beast"; EVIL, WICKED, WHITE DEVIL"; "FALSE so-called Negro leaders"; "FALSE black preachers" and the like.

The criteria for exclusion of all literature, including religious literature, are set forth in the Florida Department of Corrections' Admissible Reading Material Rule, Section 33-3.12, Florida Administrative Code (1985), which, in relevant part, provides:

> Any publication shall be disapproved and may not be received by inmates if it:
>
> (c) Is dangerously inflammatory in that it advocates or encourages riot, insurrection, escape, disruption of the institution, violence or violation of law or Department or institution rule, the violation of which would present a serious threat to the security, order or rehabilitative objectives of the institution,
>
> * * * *
>
> (e) Otherwise presents a clear and substantial threat to the security, order, or rehabilitative objectives of the Correctional System, or to the safety of any person.

The parties agreed that Rule 33-3.12 set forth the applicable constitutional standard. The issue, therefore, was whether the publications at issue violated the Rule as written. The district court found that the literature, on its face, did not "advocate" or "encourage" improper conduct and, therefore, by definition could not be considered "dangerously inflammatory." In the absence of any evidence that racist religious literature had ever led to prison violence, the district court also found that the literature at issue did not otherwise present "a clear and substantial threat to the security [or] order" of the prison system. 641 F. Supp. at 327; A92.

On the eve of trial, defendants conceded that the Hebrew Israelite faith was a bona-fide religion (641 F.Supp. at 315; A38), that the representatives of the plaintiff class scheduled to testify "were sincere in their belief in and desire to practice the Hebrew Israelite religion" (641 F.

Supp. at 317, n.6; A112) and that the publications at issue were religious in nature.[6]

Plaintiffs admitted that some of the literature was racist or derogatory toward other races and religions. But plaintiffs established that racist or derogatory religious literature is not the cause of violence or other disruption of prison life. No evidence to the contrary was offered by the defendants.

After a week long trial, the district court found that the Hebrew Israelite literature did not meet those standards for exclusion set forth in the Admissible Reading Material Rule and enjoined the defendants to permit Florida inmates to receive and possess them.

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6. Defendants contended that 100 Years of Lynchings was not a religious publication because it was originally published elsewhere and because it dealt only with historical events. Since historical events play such an important role in the history of the world's religions, the district court rejected that position.

REASONS FOR DENYING THE WRIT

A.

THE DISTRICT COURT DECISION IS CONSISTENT WITH THE STANDARD ESTABLISHED IN TURNER V. SAFLEY -- THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO INDICATE THAT PRISON OFFICIALS HAD EXAGGERATED THEIR RESPONSE TO PERSONALLY DISTASTEFUL RELIGIOUS LITERATURE

Petitioners argue that application of the standard articulated in Turner v. Safley, ____ U.S. ____ , 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) and O'Lone v. Estate of Shabazz, ____ U.S. ____, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) for review of prison decisions that infringe on the constitutional rights of prisoners, rather than the standard articulated in Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), would have resulted in a different outcome. In making that argument they ignore both the record below and the standard applied by the district court. Because they could not support their censorship with

any objective evidence, they lose under Procunier. Because their censorship was an unreasonable and exaggerated response to a non-problem, they lose under Turner and O'Lone.

This case involves more than "prisoner's rights." The Florida Department of Corrections has told an admittedly bona fide religious group that its publications, including a slightly modified edition of the King James version of the Bible, will be excluded unless and until the faith deletes those portions of its religious writings that the defendants dislike. Moreover, contrary to their assertion (Petition for Certiorari, p. 9), defendants did not offer to remove material to which they objected and provide the remainder to the inmates. Instead, they told Yahweh Ben Yahweh, the spiritual leader of the Hebrew Israelites, that if specified text and pictures were removed "together with 'all derogatories [sic] comments concerning other faiths and

religions,'" that they would permit inmates to receive the publications. 641 F. Supp. at 321; A63.[7]

On the facts of this case, defendants did not lose because the district court applied the wrong standard. Instead, they lost because of a total lack of evidence to support their speculation and conjecture concerning the consequences of permitting the Hebrew Israelite religious literature to enter Florida's prisons.

The district court did not apply a strict scrutiny test. Because defendants had engaged in "subjective, content-based censorship of pure religious speech," (641 F. Supp. at 324; A80), the district court applied what it characterized as a "less restrictive means test." 641 F. Supp. at 323; A76. However, unlike the decision in

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7. Letter from defendant Counselman, the Head Chaplain, to Yahweh Ben Yahweh, dated September 16, 1985. Plaintiff's Trial Exhibit 86. A copy is attached as an Appendix to this brief.

Shabazz v. O'Lone, 782 F.2d 416, 420 (3d Cir. 1986)(en banc), the district court did not place the burden of proof on the defendants. Relying on Hernandez v. Estelle, 788 F.2d 1154 (5th Cir. 1986) to effect a balance between the retained constitutional rights of inmates and the deference to be afforded prison officials, the district court simply required the officials to "come forward with some objective evidence to justify the outright ban . . ." 641 F. Supp. at 328; A95. The defendants were not forced to prove the non-existence of all viable alternatives. All they were asked to do was support the alternative they chose with some objective proof.

In summarizing its decision, the district court stated:

> The Court's ruling here is equally grounded on its finding of fact, and as a matter of law, that the defendants have completely failed to show, by any objective evidence, that the introduction of Hebrew Israelite literature and/or the allowance to Hebrew Israelite inmates of the full range of worship opportunities enjoyed by

> members of other faiths would "encourage or advocate riot, insurrection, escape, disruption, violence or violation of [applicable] rules" or would present any "clear and substantial threat" to prison security.

641 F. Supp. at 329; A102.

The district court also recognized the essentially uncontradicted proof introduced by the plaintiffs that religious literature, even racist and derogatory religious literature, is not, and never has been deemed, the source of violence or other prison disruption, anywhere in the country.[8] 641 F. Supp. at 322; A69. Defendants offered no evidence to the contrary.[9]

Defendants protest that the district court failed to defer to their good faith judgment. But, for prison officials to be

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8. The defendants in Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987), cert. granted, 108 S.Ct. 1572 (1988) were also unable to connect literature with violence.

9. Indeed, their own expert testified that the only violence ever traced to religious materials happened when prison officials excluded Black Muslim religious literature. 641 F. Supp. at 320; A61.

entitled to deference, their decision to exclude must be reasonable. Where there is "substantial evidence in the record to indicate that the officials have exaggerated their response," Turner v. Safley, supra, 107 S.Ct. at 2260, quoting Pell v. Procunier, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974), their entitlement to deference falls away. Thus, the inquiry is "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." Turner v. Safley, supra, 107 S.Ct. at 2261.

The test applied by the district court was more deferential than Procunier requires. The argument that Procunier "required the lower court to focus on whether the racist and inflammatory literature at issue presented a potential danger -- whether it was reasonably likely to cause prison violence or threaten security and order"

(Petition, p. 45), assumes the very facts at issue. It is nothing more than a rehash of their failure to adduce any objective evidence which would in any way support their claim that the Hebrew Israelite literature was dangerously inflammatory and carried a real potential for violence or other disruption of prison life. Plaintiffs proved that the literature was not inflammatory and did not pose a threat to security or order. Defendants offered nothing in rebuttal, other than speculation and conjecture. The district court focused, to the dismay of petitioners, on the lack of rebuttal evidence. On the evidence, there was no potential danger.

Furthermore, petitioners' argument that the decisions below conflict with authority in other circuits is disingenuous at best. For example, in Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252, 1257 (8th Cir. 1987) the court held that "materials that advocate violence or that are so racially

inflammatory as to be reasonably likely to cause violence" could be excluded. Certainly, the holding in Murphy is correct. But petitioners' efforts to bring themselves under the Murphy umbrella, in the words of Judge Posner in another prison freedom of religion case, is "the piling of conjecture upon conjecture." Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988).

Most inexplicable is petitioners' effort to find comfort in McCabe v. Arave, 827 F.2d 634 (9th Cir. 1987). That court applied the Turner standard, not the Procunier standard, to a prison's exclusion of religious literature and held "that literature advocating racial purity, but not advocating violence or illegal activity as a means of achieving this goal, and not so racially inflammatory as to be reasonably likely to cause violence at the prison," could not be excluded. 827 F.2d at 638. The district court, sub judice, reached the same result.

Petitioners fail to cite Hernandez v.

Estelle, 788 F.2d 1154 (5th Cir. 1986), from which the district court derived its objective factors test. The Fifth Circuit there approved of prison censorship because the prison officials were able to identify specific events in support of their claim of need. Unlike the Texas officials, petitioners could not identify any specific events which provided a foundation for their speculative predictions.

A fair reading of the Hebrew Israelite literature demonstrates that it does not advocate or encourage any type of illegal or ilicit activity. Indeed, the Jail Ministry Notebook enjoins Hebrew Israelites to abide by prison rules and regulations and befriend the staff. 641 F. Supp. at 316; A45. Even the reduced protection of fundamental constitutional rights afforded by Turner and O'Lone is not enough to permit censorship of religious literature in the face of overwhelming proof that the position of the Florida prison officials is supported by

nothing more than conjecture and speculation.

The total lack of support for defendants' subjective fears is made evident by the fact that Hebrew Israelites and their literature have been in Florida jails and prisons since 1981.[10] Over the course of many years and hundreds of inmates, defendants could only point to two non-violent incidents involving individuals who professed to be Hebrew Israelites. 641 F. Supp. at 319; A96. There have been no breaches of security, no violence of any kind traced to the Hebrew Israelite publications.[11]

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10. At the time of class certification, the number of Hebrew Israelites in the Florida prison system, according to the defendants, totalled 59, scattered singularly or in small groups among 32,000 inmates at many separate prisons. Lawson v. Wainwright, 108 F.R.D. 450 (S.D. Fla. 1986). Whether defendants' estimate of 59, or plaintiff's original estimate of 75 Hebrew Israelite inmates is correct, the small numbers involved speak loudly to the overreaction of the defendants.

11. The district court did not require defendants to refrain from acting until after (fn. cont. next page)

The Hebrew Israelite literature is remarkably similar to the Black Muslim literature of the sixties and early seventies. The same reasons advanced years ago to keep Black Muslim literature out of the prisons was being paraded in court again to keep Hebrew Israelite literature out. The district court was strongly influenced by the fact that the very similar Black Muslim literature was forced into Florida prisons by way of court order in 1971. Likewise, in Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969), Texas prisons were forced to admit comparable Black Muslim religious literature. Other prison systems around the country were also forced to admit the early

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actual violence occurred as the result of admitting Hebrew Israelite literature. It merely found that five years of no violence or other disruption was a good predictor of the future. The absence of any efforts to lift the injunction requiring admission of Hebrew Israelite literature in the nearly two years that it has been in effect serves to confirm the district court's finding that defendants fears were based on nothing more than speculation and conjecture.

Black Muslim literature.[12] The respondents were unable to offer any evidence of violence or disruption as the result of these decisions.[13] 641 F. Supp. at 320; A60.

The introduction of Black Muslim religious literature had only positive effects on prison security and discipline because it improved the inmate's self-image and, therefore, decreased the likelihood of violence. 641 F. Supp. at 322; A68. Indeed, the former Director of the Pennsylvania Department of Corrections testified that while his agency first fought the admission

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12. Decisions varied, some courts requiring admission of Black Muslim literature and some finding it so inflammatory as to be properly excluded. See, e.g., Abernathy v. Cunningham, 393 F.2d 775, 779 n.5 (4th Cir. 1968); Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), cert. deneid, 379 U.S. 892 (1964).

13. When read quotes from some of the Black Muslim literature at issue in Walker during cross examination, the prison system's Security Administrator, who assumed the quotes came from the Hebrew Israelite literature, testified that it should be excluded. Why the same literature would lead to violence when possessed by Hebrew Israelites but not when possessed by Black Muslims was not explained.

of Black Muslim literature, its subsequent admission had only positive effects on security and discipline in the prisons. 641 F. Supp. at 322; A68.

The district court did not reach its decision by choosing to credit the testimony of the plaintiffs and ignoring the testimony of the defendants. That, of course, would be the epitome of failing to afford deference. Instead, the district court canvassed all the evidence and concluded that the defendants' position was premised solely on speculation and conjucture; on predictions which ignored a long track record demonstrating that religious literature does not cause prison violence or disruption.

The defendants were unable to identify any objective factors which would support their decision-making.[14] Although the

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14. One of defendants' two experts would have permitted all of the literature into minimum and medium security prisons. The other would have permitted most of the literature into all prisons.

district court, without the benefit of the decisions in Turner and O'Lone, used different terminology, it is clear that the basis of its decision was the finding that the defendants' censorship was an exaggerated response to a content-based distaste for religious beliefs outside the mainstream of contemporary American thought.

Because the standard established by the Admissible Reading Material Rule for exclusion of literature is not at issue, because the district court did not use strict scrutiny and did not place the burden of proof on the defendants, and because the record establishes the exaggerated response of prison officials to religious materials which are obviously personally distasteful to them, certiorari should not be granted to review a purely factual matter.

B.

PROCUNIER V. MARTINEZ ESTABLISHED AN APPROPRIATE STANDARD TO TEST SUBJECTIVE, CONTENT-BASED, CENSORSHIP OF PURE RELIGIOUS SPEECH BY PRISON OFICIALS

This Court will soon consider whether the intermediate scrutiny standard of Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), or the far more relaxed standard of Turner v. Safley, U.S. _____, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), or some other standard, applies when prison censorship decisions impact on publishers as well as inmates. Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987), cert. granted, 108 S.Ct. 1572 (1988).

The issues in Abbott, however, are far different from the instant case. First, of course, in Abbott the censorship rules were attacked as facially invalid. In the instant matter, on the other hand, it was conceded that the Florida Rule sets forth the appropriate standards for determining

when literature could be excluded. The instant case does not challenge the right of the defendants to exclude written materials when there is some objective proof linking the written word to potential violence or disruption. Instead, the instant case presents a narrow challenge to content- and viewpoint-based censorship of religious literature which is personally distasteful to Protestant prison chaplains.

Second, although the publications at issue in Abbott were not described in detail, none appear to be from religious groups or religious in nature. In the instant matter, on the other hand, the publications come from a bona fide religious group and are religious in nature. The respondents' strained effort to distinguish the interest of the letter writter from the interest of the religious leader providing his flock with the written word (Petition, p. 26) is not helpful. Nor does this case involve mass mailings. Instead, it involves

the total denial of one of our most fundamental rights. Absent some objective proof of need, no prison official should be permitted such an unlimited constitutional intrusion.

Respondents suggest that the Procunier standard far better accommodates the sometimes competing interests of prisoners, prison officials, and religious publishers. Petitioners have made no showing, either below, or in their Petition, that the application of the Procunier standard has led to detrimental interference in the day to day operation of any prison system. Furthermore, they have made no showing that the outcome of this matter would be any different if the Turner standard were applied. Because the censorship decisions of the petitioners implicate the fundamental rights of both prisoners and publishers of religious literature, and because the record establishes the exaggerated and unreasonable response of the defendants to benign litera-

ture, respondents suggest that the granting of certiorari in this matter is not appropriate.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

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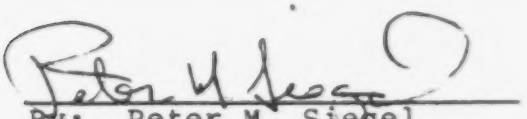

By: Peter M. Siegel

* Counsel of Record, Member of the Bar of the Court

NO. 87-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

RICHARD L. DUGGER, et al.,

Petitioners,

vs.

ROBERT L. LAWSON, et al.,

Respondents.

APPENDIX

Plaintiffs' Trial Exhibit 86,
Letter from defendant Counselman
to Yahweh Ben Yahweh A2

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard, Tallahassee, Florida 32301 • Telephone: 904/488-5021

September 16, 1985

Mr. Yahweh Ben Yahweh
P.O. Box 420
Hollywood, Florida 33022

Dear Mr. Yahweh:

The Department of Corrections has evaluated the religious material of the Temple of Love and have determined that the filing of religious materials will be permitted to be mailed to inmates at the Department of Correction Facilities so long as the noted pages are removed and all derogatories comments concerning other faiths and races are removed.

A) The Devine Dietary Laws for Hebrew Israelites.
B) The Holy Bible as written for Hebrew Israelites.

This Bible is acceptable for distribution within the Deapartment of Corrections once the following pictures are removed. The pictures between 120 and 121 entitled "Victims of Hate", "White people Hate Blacks Forever", "Slave Killings by Whites". The picture titled "Little Horn Symbol of Pope" on pages 752 - 753 and the picture "The First Beast" and "The Dragon-Pope of Rome - 666" on pages 1068 - 1069.

C) "Let my People Go", acceptable when derogatories references noted above are removed.

D) "Yahweh, God of Gods, Hebrew Israelite Jail Ministry" and "Lambs Letter". Acceptable once derogatory comments as noted above are removed.

E) "You are not a Nigger, Yahweh, God of Gods" acceptable for distribution once the following pages are removed; 16, 17, 21, 22, 24-27, 32-36, 43, 46, 47, 52, 63-65, 68, 71, 73, 74, 76, 86, as well as all derogatory references to other races or religions.

The policiy of the Department of Corrections is to permit inmates to have the greatest freedom of religious expression permissable within the context of maintaining institutional security, order and a rehabilitative environment.

It is also our policy that inmates have the right to believe anything they wish in their religious context but that they are not permitted to act out these beliefs when security order and rehabilitation may be indangered. To this end inmates who are of the Hebrew Israelite faith will be permitted to have prayer meetings in the same fashion as all other inmates of other religious faiths and Hebrew Israelite Elders will be permitted to conduct services within the Department of Corrections facilities so long as the services do not infringe upon the security order of the institution and the Elders involved contact the institution Chaplain in sufficient time for the legistics of the service to be worked out.

Additionally, if you should have futher publications which you wish to have sent to Hebrew Israelite inmates, it might speed the process some what if you were to first send them to me for my review. Thank you for your time.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William E. Counselman
William E. Counselman
Correctional Chaplaincy
Services Administrator

WEC/jg

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that, in accordance with Rule 28.3, I have served three copies of the annexed Brief in Opposition to the Granting of a Writ of Certiorari on the attorneys of record by placing a copy in the

United States mail, first class mail, postage prepaid, addressed as follows:

Robert A. Butterworth
Attorney General

Jason Vail
Assistant Attorney General

Counsel for Petitioners
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Fla. 32399

All parties required to be served have been served. Done this 24 day of June, 1988.

Peter M. Siegel, Esq.

D116/sctbrief1

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM OF PETITIONERS

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ATTORNEYS FOR PETITIONERS

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REPLY MEMORANDUM OF PETITIONERS

A.

In our petition we suggested that this case presented issues similar to those in a case now pending before the court on petition for a writ of certiorari, Meese v. Abbott, case no. 87-1344, cert. granted 108 S.Ct. 1572 (1988). We asked the court to grant the writ but to stay consideration of

this case pending a decision in Abbott that may resolve all or part of the issues presented here. Not surprisingly, the respondents contend that Abbott is dissimilar.

The respondents offer two distinctions. The first, they say, is that Abbott deals with a challenge to the facial constitutionality of a Bureau of Prisons regulation governing the censorship of publications, while this case involves the question of when literature may be excluded under an administrative rule the parties agreed was constitutional. This distinction is without substance. The respondents challenged the unwritten policy of the Florida Department of Corrections of refusing admission of racist and inflammatory literature. There is no substantive difference between a written and an unwritten policy.

Moreover, the trial court in this case found the strict scrutiny test of Procunier v. Martinez, 416 U.S. 396 (1974), to be applicable when considering decisions to exclude individual publications under a facially valid rule. See Lawson v. Wainwright, 641 F.Supp. 312, 327 (S.D. Fla. 1986); A 93-A94.

The second distinction the respondents cite is that Abbott did not involve religious speech. It is clear, however, from the petitioners' petition in Abbott that at least some of the materials, like the ones in this case, were racist or preached ethnic superiority. See petitioners' petition, p. 6 n.5.

The fact that this case involves both religious and speech rights is not a principled basis for imposing some sort of heightened review above that ordinarily given speech cases. This Court has stated

in the past that the free exercise of religion (in nonprison contexts) may not be infringed without a compelling state interest, and that such an interest must ordinarily be of the highest order. Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). But, it is not clear if this Court regards a compelling interest of the highest order to be a form of heightened scrutiny above that given non-religious speech cases.

In past cases involving religious speech, the Court has not distinguished on the basis of the speech's content -- that is, whether the case concerns political or religious matters. Rather, the court has treated religious speech cases similar to the way it has treated political speech cases. See Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed.2d 265

(1946); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 89 L.Ed.2d 1292 (1942). Cf. Wooley v. Maynard, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977), in which the Court did not distinguish between speech involving religion, politics or ideological causes and said that the right to speak on these subjects was part of a broad concept of individual freedom of mind.

Thus, there appears to be no basis for distinguishing this case, concerning religious speech, from Abbott, concerning other types of speech. Any decision in Abbott should affect the outcome of this case.

In final response to the respondents' point, we suggest the possibility that the publications at issue are not entitled to First Amendment protection. This Court has recognized that some types of speech either

are excluded from, or afforded limited, constitutional protection. The First Amendment does not protect:

1. obscene material, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957);

2. child pornography, New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982);

3. fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942);

4. incitement to imminent lawless activity, Brandenberg v. Ohio, 395U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969);

5. libel, defamation or fraud; see, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); Gertz v. Robert Welch,

Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed 919 (1952); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed 155 (1939). See also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 n.22, 104 S.Ct. 1949, 1961 n.22, 80 L.Ed.2d 502 (1984).

In particular, this court has held that racist, derogatory statements are not entitled to first amendment protection. Beauharnais v. Illinois, supra. Various parts of the publications at issue are at least, if not more, racially vituperative and derogatory that the statements held to constitute criminal libel in Beauharnais. See the appendix to Justice Douglas' dissent, which reproduced the pamphlet the petitioner in Beauharnais was convicted for distributing.

Therefore, we submit that there is substantial reason to conclude that the publications at issue are not subject to first amendment protection and that a decision in the Abbott case is likely to have a significant impact on the consideration of this case.

B.

The respondents argue that even if the reasonableness test of Turner v. Safley, 107 S.Ct. 2254 (1987), applies to this case, we failed to pass it because we offered no "objective evidence" to support our policy of excluding racist publications. Thus, the respondents see the policy as an exaggerated response. Along this line, the respondents contend that the "uncontradicted proof" showed that racist literature was not the source of prison violence.

This was not what was proven at trial. Rather, we were unable to offer evidence that a Hebrew Israelite inmate -- or any inmate for that matter -- read a piece of literature and because of that went out and committed a violent act. It does not logically follow that this kind of evidence supports the respondents' broad conclusion that they "established" the absolute lack of a causal link between racist literature and prison violence. The evidence only established, if anything, that no inmate has been immediately provoked to violence because of something he had read. Both the respondents and the trial court placed great stress upon the lack of any such direct link, and in fact, the trial court's decision hinged on it. Lawson v. Wainwright, 641 F.Supp. at 27; A93-A94:

> By their [the petitioners'] failure to present any evidence of violence, disruption, or actual threats to the security and order of any institution in which one or more inmates participated in Hebrew Israelite worship and/or possessed the sect's publications, the defendants fall short of satisfying their evidentiary burden in opposing the plaintiff's claims.

Ibid. See also Id., 641 F.Supp. at 320; A60.

This was the sort of "objective evidence" we were supposed to offer at the trial. We have no quarrel with the idea that the decisions of prison officials should be based on "objective evidence." The very notion of reasonableness embodied in this court's decision in Turner v. Safley, supra, would appear to require objective facts to support the reasonableness of a prison official's judgment. However, by holding that only a showing of past actual harm constituted

"objective evidence", the trial court went too far.

Even in the case relied on by the trial court for its objective evidence rule, Hernandez v. Estelle, 788 F.2d 1154 (5th Cir. 1986), no showing of a direct link between the publication at issue and prison violence was required to ban it. In Hernandez, the court of appeals permitted the banning of a newsletter because "of the established turmoil in the Texas Department of Corrections immediately preceding and during the time" that the publication was banned. Id. 788 F.2d at 1156. That turmoil included the takeover of a prison unit and a work stoppage at another unit. There were sit down strikes at a third unit and the inmates had occupied the prison yard. In addition, a significant civil rights case challenging prison conditions was set to go to trial soon. Id., 788 F.2d

1156. The newsletter excluded in the case contained three objectional letters that encouraged racial hatred. Prison officials "saw these articles as a potential spark which could ignite a 'powder keg situation.'" Ibid. There was, however, no showing of any connection with the newsletter and any act of violence.

Similar evidence of turmoil is present in the testimony in the case now before the court. Much of it came from the mouths of the respondents' own expert witnesses. Richard Swanson, for example, testified that he found racial tensions in Florida prisons during one study in which he took part. Mr. Swanson also testified that he also would have had questions about the Hebrew Israelite material. (Trial transcript pp. 158-159) He said he understood why prison officials might be reluctant over the material. (Trial

transcript p. 135) Allyn Sielaff, a respondents' witness, testified that the Hebrew Israelite literature was racist and that it wasn't a good idea to encourage racism in prison. (Trial transcript p. 57) Another respondents' witness, Leo Carroll, concurred that it wasn't a good idea to teach racism in prison, and he said that racial slurs or racial rage can cause prison violence. (Trial transcript pp. 355, 357, 360-361)

However, the trial court did not -- and the respondents do not now -- discuss this testimony, which came out on cross examination. Instead, the trial court accepted the respondents' view that a showing of a direct link between the admission of a piece of paper and an act of violence was required before a publication could be banned. And in reviewing the evidence, it appears that the trial court

sought that proof not in all the testimony, but only in the testimony of the defendants' witnesses. See Lawson v. Wainwright, 641 F.Supp. at 320, 322; A60, A68-A69.

The respondents also attempt to draw a link between the admission by court order 20 years ago of Black Muslim literature into various state prisons. Respondents' response p. 19. They cite testimony offered at trial which indicated that Black Muslim literature was as racist as that of the Hebrew Israelites but caused no problems. However there is no testimony whether the conditions of racism existing in prisons are the same today as they were when the Black Muslims were at their most active and vituperative.

Indeed, it appears that in recent years, white supremacist groups are more active in state prisons around the

nation. See McCabe v. Arave. 827 F.2d 634 (9th Cir. 1987); Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252 (8th Cir. 1987). It is not unreasonable to conclude that white racists might react with less than liberal tolerance if the type of racist literature at issue in this case circulated freely on a prison compound.

Thus, the respondents' argument is wrong that there was no objective evidence supporting the decision to ban the publications at issue and that therefore it was unreasonable to do so (violating Turner). The response of the petitioners was not exaggerated.

C.

The respondents further argue that the trial courts did not apply the strict scrutiny test of Procunier v. Martinez, supra, but instead balanced the

constitutional rights of inmates against the deference that should be accorded judgments of prison officials. (Respondents' response, pp 11-12).[1]/

This assertion is plainly wrong. The trial court discussed the applicability of the Martinez strict scrutiny test, as interpreted by the Eleventh Circuit Court of Appeals,[2]/ and then applied it. See Lawson v. Wainwright, 641 F.Supp. at 323-324, 329; A76-A80, A98-A100. To be specific, the court concluded that the prison practice of excluding an entire

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[1]/ This Court in Turner v. Jaffey, 107 S.Ct. 2254, 2257 (1987) referred to the Martinez test as strict scrutiny.

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[2]/ See Shabazz v. Barnauskas, 790 F.2d 1536 (11th Cir 1987), Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983).

questionable publication was more restrictive than necessary and thus failed the Martinez test. Id., 641 F.Supp. at 329; A99-A101.

In addition, the trial court recognized the third part of the Martinez analysis. That part, which we addressed at length in our petition,[3/] provides that prison officials, in making decisions whether to admit or exclude a given document, cannot be held to prove with certainty that adverse consequences would follow from its admission. Id., 641 F.Supp. at 327; A93-A94. The trial court, however, misinterpreted this part to require prison officials to show that harm had already resulted directly from the admission of the

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3/ See our petition, pp.38-46.

respondents' literature before it could be banned. Id., 641 F.Supp. at 327-328, 329; A93-A97, A102-A103. The respondents' assertion thus is incorrect.

CONCLUSION

Based on the arguments presented we respectfully as the Court to grant the Petition.

Respectfully submitted,

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